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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 705

C. D. SHEPHERD, ET AL.,
Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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April 5, 1949.

THE BUNTING-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 38

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred A. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, C. D. Shepherd, J. W. McDonald, E. F. Allen, M. L. Pennebaker, C. E. Martz, J. J. Kain and F. W. Coyle, who are of the craft of employees known as brakemen, herewith petition for review on writ of certiorari of a decision of the United States Court of Appeals for the Seventh Circuit made December 14, 1948, which became final on denial of rehearing January 14, 1949, affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division.

STATEMENT OF THE MATTER INVOLVED.

Introduction.

This case presents the question whether the injunctive process was properly used in a dispute involving porters and brakemen as to which of these two separate classes of railroad employees shall perform braking duties at the head end of passenger trains of the Atchison, Topeka and Santa Fe Railway Company. The porters, who are employees at will and have no collective bargaining contract, base their claim to the disputed work on custom and usage (R. 16). The brakemen, for whom the Brotherhood of Railroad Trainmen is sole collective bargaining representative under the Railway Labor Act, base their claim on a contract made by their union with the Santa Fe specifically covering the disputed work (R. 210-216). Brakemen had begun to receive assignments to the disputed work pursuant to that contract when this suit by the porters intervened (R. 77). Since October 31, 1944 injunctional orders have secured the porters in the disputed work then held by them (R. 86-89, 141-143, 207-208).

History of the Dispute.

Porters have for many years been assigned, over the Brotherhood's protests, to braking work at the head end of Santa Fe passenger trains in addition to their duties of assisting passengers and keeping cars clean (R. 202-203). The Brotherhood's position has been that the brakemen's basic working agreement with the Santa Fe covered head end braking work (R. 225-229).

On April 20, 1942 the Brotherhood won an Award in the National Railroad Adjustment Board, First Division, for

wages lost by brakemen on account of the Santa Fe's refusal to assign them to this work (R. 58-59). The Board based its money award on its finding that "use of porters or other employees, who do not hold seniority as brakemen, is in violation of claimants' seniority rights" (R. 59). The Board's Award stated that it did not pass on any future claims and it was silent as to whether brakemen should be assigned to the disputed work in the future (R. 59). The porters were not parties to the proceeding in the Board (R. 219).

The Santa Fe refused to pay the wage claims which were allowed by the Award and, instead, sought rehearings before the Board for about two years (R. 132-134). The porters learned of the proceeding at least as early as May, 1942 (R. 109-110), and followed the Santa Fe's efforts for rehearings (R. 216-218, 259-261), but did not seek to intervene in the proceeding because they did not believe the Board had authority to hear them (R. 110, 200-A).

Collective Bargaining Agreement of April 27, 1944.

On April 27, 1944 the Brotherhood and the Santa Fe after many months of collective bargaining (R. 151), entered into a written agreement by which numerous disputes were settled (R. 153). A portion of this agreement provided that brakemen were to be assigned to head end braking duties on a gradual basis over a period of time depending on the manpower situation (R. 210). The brakemen agreed not to make claims for wages lost on account of non-assignment of brakemen during this period (R. 211). The agreement also provided a specific method for payment of claims for past wages, including those which had been allowed by the Board's Award and Order of April 20, 1942.

On May 3, 1944 the Santa Fe notified the Board that

its request for rehearing was withdrawn, the subject matter of the Award "having been disposed of by mutual agreement between the Carrier and the affected organizations" (R. 134).

The existence of this collective bargaining agreement of April 27, 1944 was not noted by the District Court in its findings and conclusions (R. 201-207), or by the Court of Appeals in its opinion (R. 299-307).

The Injunction Suit.

In accordance with the collective bargaining agreement of April 27, 1944 the Santa Fe was in August 1944 proceeding to make assignments of brakemen to head end braking duties. On August 21, 1944 Santa Fe porters as a class brought this suit for a permanent injunction against the railroad and certain individual brakemen, including the present petitioners, who were alleged to be representatives of Santa Fe brakemen as a class (R. 2-5), to prohibit the displacement of porters by brakemen in the performance of the disputed head end braking work (R. 44-45). The National Railroad Adjustment Board, First Division, was named as a defendant (R. 4), but the Brotherhood was not made a party.

The porters base their claim for an injunction on the theory that custom and usage have given them a contract right to do head end braking work, that they were not given notice of the Adjustment Board proceeding in the dispute between the Brotherhood and the Santa Fe, and that the Award which resulted in favor of the Brotherhood was therefore void (R. 39-43). Plaintiffs assert that their present displacement by brakemen in the performance of braking duties is by virtue of the enforcement of the Board's Award (R. 43). They also claim that the agreement between the Santa Fe and the Brotherhood of April

27, 1944 was procured through compulsion and threats of reprisals by the Brotherhood (R. 24-25).

One of the defendants is a vice-president of the Brotherhood, but he is sued as an individual (R. 4). The named brakemen defendants are all employed on the Illinois Division of the Santa Fe, and have no employment rights outside their own seniority district (R. 167, 177). These individual defendants answered, denying that they are representatives of brakemen in the many districts against whom relief is sought, and stating that the Brotherhood is the only proper representative and should be a party (R. 92). The brakemen also contended that plaintiffs, being a separate class of employees and strangers to the contract between the Brotherhood and the Santa Fe which was submitted to the Board as the basis of the brakemen's claims for lost wages, were not entitled to formal notice of the Adjustment Board proceedings, but that they had actual notice thereof and made no attempt to intervene (R. 96-97). The brakemen contended that the Award merely allowed wages claimed by brakemen against the Santa Fe, and had no legal effect on the employment rights of porters (R. 119). The brakemen denied that the agreement of April 27, 1944 between the Brotherhood and the Santa Fe, which did result in assignment of some of the disputed work to brakemen, was made through any compulsion or threats by the Brotherhood (R. 94, 98). The brakemen contended that the Court should not intervene in this jurisdictional dispute between two classes of railroad employees which should be determined only under the processes prescribed by the Railway Labor Act, and they challenged the Court's power to grant injunctive relief because they urged the involvement of a labor dispute within the meaning of the Norris-LaGuardia Act (R. 117-121).

The Santa Fe's answer denied that the Adjustment Board Award was invalid, and asserted that the April 27,

1944 agreement to assign brakemen to the disputed work was voluntarily entered into on its part (R. 76, 78-79). The Santa Fe prayed that the plaintiffs' suit be dismissed (R. 80).

Hearing On the Preliminary Injunction.

The undisputed evidence regarding the making of the April 27, 1944 contract disproved plaintiffs' allegation that there was any compulsion connected with it (R. 167-168). As to actual knowledge on the part of the porters of the Adjustment Board proceeding prior to the entry of the Award, evidence was excluded as immaterial (R. 261-263).

The Preliminary Injunction.

The District Court granted a preliminary injunction on the ground that the Adjustment Board Award deprived plaintiffs of their property without due process and was void (R. 206). The preliminary injunction, which continued restraints previously imposed by temporary restraining orders, prohibited "any steps to enforce the said Award by removing and displacing" any plaintiffs from their positions (R. 207-208). The effect of these injunctional orders was to prevent performance of the April 27, 1944 agreement (R. 163), although there were no findings or conclusions stated concerning this contract (R. 201-207).

Bond for the preliminary injunction was fixed at $1,000, an amount which was admittedly only a small fraction of the brakemen's lost wages (R. 145). The reason assigned for the nominal amount was that the District Judge saw no merit in the brakemen's defense (R. 200-B).

The Decision On Appeal.

The brakemen appealed from the injunction order to the Court of Appeals for the Seventh Circuit, in which Court their erstwhile co-defendant, the Santa Fe, joined the opposition and urged affirmance of the injunction, thus reversing the position the railroad had taken in its answer (R. 80, 326).

The Court of Appeals affirmed (R. 308). It held that the Brotherhood was not an indispensable party because the order appealed from took nothing from the brakemen to which they were "rightfully entitled" (R. 306). The Court held that the only issue "is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding," and concluded that the porters were entitled to such notice (R. 302, 304). The opinion indicates that actual knowledge of the Board proceedings on the part of the porters might have been the equivalent of formal notice, but the Court pointed out that "the record does not disclose that the porters had notice of any kind prior to the entry of the Award" (R. 303). The opinion did not express any view as to the exclusion by the trial court of evidence on the subject of prior knowledge.

The Court's opinion recognized that the dispute involved in this case is analogous to that in *Missouri-Kansas-Texas R. Co. et al.* v. *Randolph, et al.* (8th Cir. 1947), 164 F. 2d 4 (R. 304). In that case the carrier, pursuant to an agreement with its brakemen, proposed to cancel its contract with the porters and assign the disputed work to brakemen (R. 302). Injunctive relief was denied because of the existence of the jurisdictional dispute determinable only under the Railway Labor Act, and because of the existence of a labor dispute within the meaning of the Norris-LaGuardia Act. The Court of Appeals for the Seventh Circuit considered the instant case distinguishable from

the *Randolph* case on the theory that in our case "it is an attack only upon an Award which has been made," and that here the injunction sought does not prevent settlement of the dispute by collective bargaining (R. 302, 304). However, during the argument of the appeal it was conceded that performance of the April 27, 1944 contract between the Brotherhood and the Santa Fe, which purported to settle the dispute, was prohibited by the injunction (R. 312-313).

The Court of Appeals also expressed the view that the Adjustment Board exceeded its authority in construing the basic working agreement between the Brotherhood and the Santa Fe as applicable to head end braking work (R. 305-306). But the Court's decision that the Award is void was based primarily on lack of notice to porters, and the opinion so states (R. 306).

Application for Rehearing.

The brakemen applied for a rehearing, chiefly on the ground that a consideration of the April 27, 1944 bargaining agreement, which the Court had failed to mention in its opinion, would require a different result in view of the Court's holding that the parties were "free to attempt to settle the dispute by collective bargaining" (R. 312-313). Rehearing was denied, without opinion (R. 345).

TEMENT AS TO JURISDICTION.

ıght To Be Reviewed.

er 14, 1948, the United States Court of Ap- Seventh Circuit entered judgment affirming February 6, 1948 of the United States District Northern District of Illinois, Eastern Divi- a preliminary injunction (R. 308). The said the United States Court of Appeals became enial of a petition for rehearing on January 345). Application for writ of certiorari is , 1949. The opinion of the Court of Appeals, er 14, 1948, has been made part of the printed (R. 299-307). It is reported in 171 F. 2d 594. Court rendered no opinion, but the prelim- ion itself (R. 201-208) is reported at 78 F.

ovisions and Cases Sustaining Jurisdiction.

ıe Court of the United States has jurisdiction, ertiorari granted upon the petition of any ew a judgment rendered in a United States eals. 28 U. S. C. Sec. 1254. The application within 90 days after entry of such judgment. c. 2101.

's jurisdiction to grant certiorari extends to ıstaining a preliminary injunction. *Land* v. S. 731, 735; *United States* v. *General Motors* S. 373, 377; *Toledo Scale Co.* v. *Computing* U. S. 399, 418. Where petition for rehearing , the judgment does not become final for

purposes of review until disposition of such petition. *Citizens' Bank of Michigan City* v. *Opperman*, 249 U. S. 448, 450.

Substantial Questions Involved.

Substantial questions are involved on this appeal, as will appear from the statement of them which immediately follows.

QUESTIONS PRESENTED.

The questions presented herein include the following:

1. Whether a union acting as collective bargaining representative of railroad employees is an indispensable party defendant to a suit brought by a rival labor group which seeks:

(a) To enjoin performance of a labor contract made by the union with the railroad on the ground that the union forced the railroad to enter into the contract through threats and compulsion.

(b) To nullify a National Railroad Adjustment Board Award rendered in favor of the union in a dispute between the union and the railroad on the ground that the rival labor group did not receive proper notice of the proceeding.

2. Whether a dispute which involves the conflicting demands of two groups of railroad employees who claim the same work is a jurisdictional dispute determinable only by negotiation, mediation or arbitration as provided by the Railway Labor Act or whether such a dispute presents a justiciable controversy by reason of circumstances as follows:

(a) One of the competing groups has submitted a dispute between it and the railroad over wage claims relating to the disputed work to the National Railroad Adjustment Board and has obtained an award allowing such claims, of which proceeding the other group received no formal notice.

(b) The group which won the Adjustment Board Award subsequently obtained a contract with the railroad specifically promising the disputed work to employees in that group.

(c) The plaintiff group of employees has not attempted to settle its claims under the processes prescribed by the Railway Labor Act.

3. Whether a dispute such as that described in the preceding paragraph is a labor dispute, and if so whether the restraints imposed by the Norris-LaGuardia Act on the granting of injunctive relief are applicable to a case which involves or grows out of such a dispute.

4. Whether in a National Railroad Adjustment Board proceeding involving interpretation and application of a collective bargaining agreement between a railroad and a labor union, as applied to wage claims of employees represented by the union, other employees who are then performing the work to which the wage claims relate, but who claim no rights under the contract before the Board and admit that they had no right to intervene in the Board's proceeding, are nevertheless entitled to notice of the proceeding, and if so, whether actual knowledge thereof is sufficient.

5. Whether an action based on alleged irregularities as to notice in a National Railroad Adjustment Board proceeding may be maintained by third parties after the subject matter of the dispute before the Board has been settled by mutual agreement of the parties to the Board proceeding, and after more than two years have elapsed since the Adjustment Board Award by its terms became effective.

6. Whether in a suit brought by a group of railroad employees seeking an injunction to secure for themselves certain work which is shown to have been promised by a collective bargaining agreement to another employee group, the Court may properly grant a preliminary injunction without making any finding of fact or stating any conclusion of law with respect to the labor agreement, the

performance of which is being prohibited by the preliminary injunction.

7. Whether a Court which issues a preliminary injunction may properly fix the injunction bond in an amount admittedly less than enough to cover losses to be sustained by those enjoined merely because the Court believes that the defenses raised are not meritorious.

REASONS FOR ALLOWANCE OF WRIT.

There are special and important reasons for review on writ of certiorari herein, as follows:

1. The Court of Appeals has held that performance of a railroad labor union's collectively bargained contract with a railroad may be enjoined and that a National Railroad Adjustment Board award rendered in favor of the labor union may be nullified in a suit maintained in the absence of the union as a party defendant. This holding decides a federal question in a way probably in conflict with applicable decisions of this Court, and, if not reviewed, may establish a precedent which will seriously imperil the position of the railroad labor union as a collective bargaining entity, contrary to the public policy declared in the Railway Labor Act.

2. The Court of Appeals has held that a group of railroad employees who are claiming the same work as that covered by a collectively bargained contract between the railroad and a competing group of employees may maintain a suit for an injunction to secure the disputed work for themselves without first attempting to settle their dispute through the processes prescribed by the Railway Labor Act and without compliance with the Norris-LaGuardia Act. This holding is in conflict with the decision on the same matter by the Court of Appeals for the Eighth Circuit in *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. 2d 4, certiorari denied in 334 U. S. 818. Certiorari should be granted to settle this conflict between the Seventh and Eighth Circuits.

3. The Court of Appeals has held that in a National

Railroad Adjustment Board proceeding involving interpretation and application of a collective bargaining agreement between a railroad and a labor union as applied to wage claims of employees represented by the union, other employees who are then performing the work to which the wage claims relate but who claim no rights under the contract before the Board and admit that they have no right to intervene before the Board are nevertheless entitled to notice of the proceeding, and that actual knowledge does not satisfy the requirement of notice. This holding decides a federal question in a way probably in conflict with the applicable decision of this Court, and should be reviewed because of its important bearing on the conduct of all Adjustment Board proceedings involving disputes between a carrier and a union as to the scope of their working agreements. The holding now sought to be reviewed casts serious doubt on the established rule that the Railway Labor Act authorizes the Adjustment Board to decide disputes only between employer and employee, and not disputes between groups of employees.

4. The Court of Appeals has held that an action based on alleged irregularities as to notice in a National Railroad Adjustment Board proceeding may be maintained by third parties after the subject matter of the dispute before the Board has been settled by mutual agreement of the parties to the Board proceeding, and after more than two years have elapsed since the Adjustment Board award under attack became effective by its terms, and that the Board's award may be reviewed on its merits and that injunctive relief may be granted to prevent compliance. This holding decides a federal question in probable conflict with the applicable decisions of this Court, with Section 3 First (p) and (q) of the Railway Labor Act and in that it purports to provide a new method for judicial review of an Adjustment Board proceeding and

thus provides an extension of the methods provided under the Railway Labor Act which have heretofore been regarded as exclusive.

5. The Court of Appeals has sanctioned the action of the District Court in granting a preliminary injunction to enjoin the performance of a labor contract without making findings of fact or stating conclusions of law with respect to the contract enjoined. Such action is in conflict with the applicable decisions of this Court construing Rule 52(a) of the Rules of Civil Procedure. The decision of the Court of Appeals holds in effect that compliance with this rule is a matter which lies within the District Court's discretion. This question is of highest importance to a proper review of injunctional orders.

6. The Court of Appeals has sanctioned the action of the District Court in issuing the preliminary injunction on the giving of a bond in an amount admittedly only a small fraction of the losses to be sustained by those enjoined, merely because the Court believes the defenses raised are not meritorious. This holding decides a federal question in a manner probably in conflict with Rule 65(c) of the Rules of Civil Procedure, which should be construed as requiring a federal court which issues an injunction to admit the possibility of its own error. This holding is of extreme importance in all cases wherein injunctive relief is granted against large groups of employees and involves losses in wages for which their remedy may be forfeited due to the Court's refusal to require more than a nominal bond to protect them.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings

of the said Court of Appeals had in the case numbered and entitled on its docket No. 9595, *Obie Fauster Hunter, et al., Plaintiffs-Appellees,* v. *The Atchison, Topeka and Santa Fe Railway Company, Defendant-Appellee, and C. D. Shepherd, et al., Defendants-Appellants,* to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

April 5, 1949.

C. D. Shepherd, J. W. McDonald,
E. F. Allen, M. L. Pennebaker,
C. E. Martz, J. J. Kain and F. W. Coyle,
Petitioners,

By .....

.....

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below, Jurisdiction, and Statement of the Case.

The preceding petition at page 9, contains reference to the opinions of the courts below and at pages 9-10, a statement as to the jurisdiction of this Court. At pages 2-8 of said petition there appears a statement of the case. These portions of the petition are adopted herein and made part of this brief.

SPECIFICATION OF ERRORS.

If the petition is granted, the petitioner will urge that the Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding that the Brotherhood of Railroad Trainmen is not an indispensable party to this suit, notwithstanding the fact that the Brotherhood was the party in whose favor the National Railroad Adjustment Board Award was rendered and which this suit seeks to nullify, and notwithstanding the fact that the Brotherhood is a party to the collective bargaining agreement the performance of which this suit seeks to enjoin.

2. In holding that the plaintiff class of railroad employees may maintain this action to secure for themselves the same work as that covered by a collectively bargained contract between the railroad and a competing class of employees without first attempting to settle their dispute through the processes prescribed by the Railway Labor Act, and without compliance with the Norris-LaGuardia Act.

3. In holding that plaintiffs, although they were strangers to the contract between the Brotherhood and the Santa Fe being interpreted by the Adjustment Board as applied to wage claims of brakemen, were entitled to notice of and to be heard in said proceeding and that actual knowledge thereof on the part of the plaintiffs did not satisfy the requirement of notice.

4. In holding that an award of the National Railroad Adjustment Board may be reviewed and set aside in a suit brought by third parties after the subject matter of the dispute before the Board has been settled by mutual agreement of the parties to the Board proceeding, and after more than two years have elapsed since the Adjustment Board Award by its terms became effective.

5. In refusing to hold that the District Court, when granting the preliminary injunction, should have made findings of fact and stated conclusions of law with reference to the collective bargaining agreement the performance of which was being enjoined.

6. In refusing to hold that the District Court, in granting the preliminary injunction, erred in requiring plaintiffs to furnish only a nominal bond to protect the persons enjoined and in denying them adequate coverage solely on the ground that their defense did not seem meritorious.

SUMMARY OF ARGUMENT.

I. The Brotherhood as an Indispensable Party.

The Brotherhood of Railroad Trainmen is an indispensable party to this suit because it was the party in whose favor the Adjustment Board Award under attack herein was rendered and the party who made with the railroad the collective bargaining agreement of April 27, 1944 sought to be enjoined herein. The Court of Appeals has held that the Award in the Brotherhood's favor was void, wherefore the Court concluded that there was no need to make the Brotherhood a party. This holding confuses the right of a party to be heard in an action with his right to prevail therein, and is of special importance because of its relation to railroad labor dispute settlement procedures authorized under the Railway Labor Act.

II. Applicability of Railway Labor Act and Norris-LaGuardia Act.

The Court of Appeals for the Eighth Circuit has held, in a jurisdictional railway labor dispute substantially similar on its facts to the one here involved, that plaintiffs had no right to an injunction without first attempting to settle their dispute under the processes prescribed by the Railway Labor Act and without compliance with the Norris-LaGuardia Act. The decision of the Court of Appeals for the Seventh Circuit now sought to be reviewed holds that court intervention by injunction in such a dispute is proper notwithstanding both these statutes. This conflict between the Seventh and Eighth Circuits justifies issuance of the writ.

III. Knowledge and Notice of the Adjustrent Board Proceeding.

Plaintiffs, having had actual knowledge of the Adjustment Board proceeding under attack, and having made no attempt to intervene, should not be heard to complain that they did not receive formal notice. Moreover, the Railway Labor Act did not require notice to be given to porters because the Board merely had before it wage claims in which plaintiffs had no legal interest and plaintiffs have themselves conceded that the Board had no authority under the Act to hear a dispute between them and the brakemen in that proceeding. The Court of Appeals' holding that the Board's Award is void for failure to give the porters notice and hearing in such a proceeding should be reviewed.

IV. The Circuit Court's Review of the Adjustment Board Award on Its Merits.

The Court of Appeals has undertaken in its opinion to review, on the merits, the Adjustment Board's interpretation of the contract between the Brotherhood and the Santa Fe as applied to the wage claims passed on by the Board. There is no occasion for such a review because that dispute was settled by mutual agreement while the Santa Fe was still contesting the matter before the Adjustment Board. Further, the Railway Labor Act does not authorize court review of an Adjustment Board Award in a suit such as this, brought by third parties more than two years after the Award by its terms became effective. The Circuit Court's holding has the effect of extending the scope of judicial review of Adjustment Board awards beyond the provisions of the Railway Labor Act.

V. Absence of Findings or Conclusions Regarding April 27, 1944 Contract.

Inasmuch as the April 27, 1944 bargaining agreement between the Brotherhood and the Santa Fe covers the disputed work, and as its performance is prohibited by the preliminary injunction, it is clear that this contract should have been the subject of findings of fact and conclusions of law in compliance with Rule 52(a) of the Rules of Civil Procedure. The failure of the District Court to make any findings or state any conclusions with reference to this all-important contract and the failure of the Court of Appeals to mention the subject in its opinion indicate that Rule 52(a) has been treated as a purely discretionary directive. The resulting confusion regarding the status of this contract emphasizes the necessity for enforcing compliance with Rule 52(a).

VI. Deliberate Inadequacy of the Injunction Bond.

The trial judge fixed the preliminary injunction bond in an amount admittedly representing only a small fraction of the wage losses to be sustained by the enjoined employees for the stated reason that he did not think their defenses were good. Such action by the trial court, which received the tacit approval of the Court of Appeals, rejects the basic principle underlying the statutory requirement for bond that a court which grants a preliminary injunction must assume the possibility of its own error and provide adequate security against this contingency without regard to its apparent remoteness.

ARGUMENT.

I.

This Court Should Decide Whether a Railroad Labor Union's Collectively Bargained Contract May Be Enjoined and an Adjustment Board Award in Favor of the Union May Be Nullified in a Suit Which Does Not Name the Union as a Party Defendant.

This suit complains primarily against a labor contract and an Adjustment Board Award, and yet it does not name as a defendant the party in whose favor the contract was made and in whose favor the Award was rendered. The Brotherhood was a contracting party with the railroad to the April 27, 1944 agreement, performance of which is sought to be enjoined (R. 210-216), and it was the party which won the Award sought to be set aside (R. 58-59). In addition, the Brotherhood stands charged with having forced the Santa Fe to make the contract in question "under threats of reprisals" (R. 25). The injunction, as issued, runs against the Brotherhood as representative of Santa Fe brakemen (R. 203, 207).

The question for decision below was whether the Brotherhood is an indispensable party in view of these obvious elements of the Brotherhood's material interest in the subject matter of this suit and the adverse effect of this action on those interests.

The absence of the Brotherhood as a party was not explained on the ground that it is merely the agent for the employees it represents. The individual brakemen named as the supposed representatives of the class of brakemen have employment rights only in one of the many Santa Fe

seniority districts (R. 166, 167), and their supposed representative capacity flows from the District Court's factual findings that they are Brotherhood members (R. 202) and that the Brotherhood represents Santa Fe brakemen as a class (R. 203). The Court of Appeals expressed its view that the Brotherhood is not an indispensable party simply as a corollary to its principal holding that the Adjustment Board Award is void. Its reasoning was as follows (R. 306-307):

> "There is also the contention that the Brotherhood of Railroad Trainmen as representative of the brakemen was an indispensable party to the instant action. Again, this argument proceeds on the theory that the order appealed from takes something away from the brakemen to which they are *rightfully* entitled. As already shown, such is not the case." (Italics ours.)

We submit that the above holding applies an entirely new test of indispensability, which is in effect that no absent person is to be considered an indispensable party unless it is shown that he would, if present, prevail in the action. Such a rule presupposes that the Court may decide, *ex parte,* whether a contract or an award under attack is valid, and that if it decides against validity, it may dispense with the naming of any persons as parties who may claim under the voided instruments.

To say the least, this holding constitutes a distinct challenge to the basic doctrine stated by this Court in *Mallow* v. *Hinde,* 25 U. S. 116 at 119-120:

> "* * * no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

The special importance of this issue lies not so much in the Court's departure from the established principles governing indispensable parties as in the fact that the Court of Appeals' decision has the effect of denying the

efficacy of railroad labor union conduct in submitting disputes for adjustment under the Railway Labor Act, and in bargaining collectively to settle them. The Circuit Court has held that the union may suffer invalidation of its award or an injunction against its contract in a court proceeding to which it is not even made a party. We submit that such a holding fully warrants review by this Court.

II.

This Court Should Resolve the Conflict Between the Seventh and Eighth Circuits on the Question Whether a Jurisdictional Dispute Between Groups of Railroad Employees Constitutes a Justiciable Controversy, and Whether the Norris-LaGuardia Act Is Applicable When Injunctive Relief Is Sought in Such a Dispute.

In *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. 2d 4 (8th Cir. 1947), certiorari denied in 334 U. S. 818, the Court held that an injunction suit by M-K-T porters against the railroad and its brakemen to prohibit displacement of porters by brakemen in the performance of head end braking work presented a jurisdictional dispute determinable under the Railway Labor Act and involved a labor dispute within the meaning of the Norris-LaGuardia Act, wherefore injunctive relief should not be granted. In that case, the porters were not merely employees at will, but had a written working agreement which the railroad proposed to cancel as applied to the disputed work in order to comply with an agreement made with the brakemen's union. The brakemen's union in that case had previously demanded lost wages from the railroad on being denied the disputed work, but had not filed wage claims with the Adjustment Board as the Brotherhood did in the instant case. Otherwise, the factual situations

presented in the two cases are identical. The Eighth Circuit's view of the applicable law was stated as follows (164 F. 2d 8):

> "To declare that a labor union's resort or threat to resort to administrative processes of mediation and adjustment by expert agencies especially set up and established by Congress for settlement of its labor disputes constitutes an enjoinable tort would completely defeat the intent of Congress as clearly shown in the Acts. We find no controversy is presented here except the labor dispute, the settlement of which is clearly within the purview of the Acts and may not be accomplished by injunction in the first instance."

In our case the Court of Appeals did not say that the *Randolph* decision was wrong, but it reached an opposite result, based on the following suggested distinction (R. 304):

> "The instant case is distinguishable because it is an attack only upon an Award which has been made."

This proposed distinction does not begin to reconcile the decisions. It ignores the fact that in our case the subject matter of the Award, that is, the wage claims, was disposed of by mutual agreement between the Santa Fe and the Brotherhood (R. 134). It ignores the fact that it was the April 27, 1944 agreement, and not the money Award for wages, which promised assignment of the disputed work to brakemen (R. 210-216). It also ignores the fact that the injunction has had no effect whatever on the Award said to have been the only object of attack in this suit, but, instead, has prohibited performance of the April 27, 1944 agreement and has secured the porters in the disputed work (R. 163). Chief Judge Major apparently had these facts well in mind during the hearing of the appeal in this case when he said (R. 312-313):

> "Well, isn't enforcement and recognition of that

contract covered in this injunction? Under this injunction you can not go on and carry out this contract, can you?"

Also during the hearing, Judge Major said (R. 314):

"As long as this injunction stands the porters will continue."

These facts obviously destroy any hope of reconciling the decision in the *Randolph* case with this one on the ground that this case "is an attack only upon an Award which has been made". Of course, the conflict in the two decisions would have been more sharply revealed if the Court of Appeals for the Seventh Circuit had seen fit to mention the April 27, 1944 agreement in its opinion.

The need for resolution of the conflict between the *Randolph* decision and this one is the more apparent when we consider that both cases purport to follow the line of decisions of this Court which culminated in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, wherein it was said that Congress, in enacting the Railway Labor Act for settlement of railway labor disputes, "intended to leave a minimum responsibility to the courts" (326 U. S. 566).

The decision sought to be reviewed stands not merely for court intervention in jurisdictional railway labor disputes at the suit of persons who have not submitted their claims to any administrative agency, but also holds in effect that collective bargaining agreements purporting to settle such disputes may be entirely ignored in the process. The importance of these questions is clear, and we submit that the writ ought to be granted.

III.

This Court Should Decide Whether Actual Knowledge Is the Equivalent of Formal Notice of Adjustment Board Proceedings, and Whether There Are Constitutional Objections to the Established Practice of the National Railroad Adjustment Board in Giving Notice of a Proceeding Involving Interpretation of a Labor Contract Only to the Parties to the Contract.

We have already seen that the real objective of this suit is to enjoin performance of that part of the April 27, 1944 agreement which promises to assign the disputed work to brakemen (R. 210-216), rather than to invalidate the Adjustment Board Award of April 20, 1942 allowing wage claims to brakemen (R. 58-59). We think this becomes all the more apparent when we consider the basis for the Court of Appeals' holding that "the only issue below, as well as here, is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding" (R. 302).

Involved with the question of any legal requirement for notice to porters of the Adjustment Board proceeding is the fact that the porters had actual knowledge of it. The evidence in the record shows actual knowledge only during the later stages of the proceeding when the Santa Fe was attempting to get a rehearing (R. 109-110, 216-218), because evidence offered by the brakemen to show earlier actual knowledge was excluded as immaterial by the trial court (R. 258-263).

This evidence point was not discussed by the Court of Appeals, although that Court rejected the brakemen's argument as to the effect of actual knowledge on the ground that "the record does not disclose that the porters

had notice of any kind prior to the entry of the Award" (R. 303). This apparent oversight was pointed out in the petition for rehearing (R. 311-312), which was denied (R. 345). We are therefore unable to explain how the Court could base its holding on the ground that the evidence did not show any early knowledge on the part of the porters and yet tacitly approve the District Court's ruling that evidence offered to show early knowledge was immaterial. The evidence point alone would clearly require reversal in view of what was said by this Court in *Elgin, Joliet & Eastern R. Co.* v. *Burley,* 327 U. S. 661, at 666-667:

> "* * * we did not rule * * * that an employee can stand by with knowledge or notice of what is going on with reference to his claim * * * before the Board * * * and then come in for the first time to assert his individual rights."

As the decision of the Court of Appeals now stands, it will undoubtedly give encouragement to employees who believe their interests are involved in a pending Adjustment Board proceeding to lie in wait until the matter is settled and then upset the result if it does not please them.

Turning now to the question whether notice to porters of the Adjustment Board proceeding was required, the issue is whether the porters, because they were performing head end braking work as employees at will, were entitled to notice of the fact that the Brotherhood was claiming before the Board that under its contract with the Santa Fe, brakemen should be paid for wages lost on account of being denied the head end work. The Court of Appeals held the Award was void "primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their constitutional right to a hearing was denied" (R. 306).

The above ruling ought to be reviewed because it holds that the Adjustment Board must, in a single proceeding, decide jurisdictional disputes between competing classes of railroad employees. The only purpose of giving notice to the porters would be to permit them to be heard by the Board. Because they were strangers to the contract before the Board, they could have no claims to assert thereunder. Nor could they have any legal interest in the question whether the brakemen's wage claims against the Santa Fe were allowed or disallowed. Therefore, the only conceivable purpose of the porters' participation in the proceeding would be to present their case for continuing in the head end braking work, *i.e.*, to assert their right to continue performing this work *at the will* of the Santa Fe. Since the railroad was in full agreement with this position, the Board, so far as the porters were concerned, would then be hearing a dispute not between employer and employee, but a dispute between two separate classes of employees engaged in a jurisdictional dispute.

The Board has no authority to hear such disputes. Section 3 First (i) of the Railway Labor Act authorizes the Board to hear only "disputes between an employee or group of employees and a carrier or carriers". This question was directly answered in *Order of R. R. Tel.* v. *New Orleans, Texas & Mex. Ry. Co.*, 156 F. 2d 1 (8th Cir. 1946), certiorari denied in 329 U. S. 758, which involved the Board's denial of an application to intervene made by one labor group during consideration of a contract between the carrier and another labor group. The Court held (156 F. 2d 5):

> "The Act authorizes the Board to interpret and to apply the collective bargaining contracts of the crafts in controversies between the crafts and the carriers involving the contracts; but it is given no authority

to pass on disputes between the crafts. The Act leaves the settlement of inter-craft disputes to conference or to the Mediation or Emergency Boards."

Applying this decision to our case, it is apparent that if the Adjustment Board which heard the brakemen's wage claims had no power to hear the porters in that proceeding, then there was no duty to give the porters notice of it. The porters acknowledged, at least inferentially, that they had no right to notice when they urged that their failure to apply for intervention in the Board proceeding was due to the fact that their intervention would have made it a dispute between classes of employees and that under the rule of the above quoted case the Board would have no power to hear them in that proceeding (R. 200-A).

The rule that the Board cannot hear jurisdictional disputes between separate classes of employees does not conflict with the Seventh Circuit's decision in *Nord* v. *Griffin*, 86 F. 2d 481 (1936), certiorari denied in 300 U. S. 673, where an individual employee was held entitled to notice and hearing in a proceeding involving interpretation of his own working agreement as applied to his individual seniority status. That case did not involve an inter-craft dispute, and the Court of Appeals has radically extended the rule therein announced by its holding that the rule is applicable to the inter-craft dispute involved here (R. 302-304). In this ruling the Court of Appeals has also failed to recognize the manifest inconsistency in the porters' position of urging, on the one hand, that the rule of *Nord* v. *Griffin* should be extended to require the Board to hear an inter-craft dispute, and on the other, urging that they should be excused from attempting to intervene because the Board had no power to hear such a dispute.

We think it is clear that Section 3 First (j) of the Railway Labor Act, in requiring the Board to give notice

of a proceeding to the employees and the carrier "involved" in a dispute submitted to the Board must be construed not to include employee groups whose claims the Board has no authority to hear in that proceeding.

Of course, this is not to say that employees in the rival group have no remedy. If they have a claim to certain work based on a working agreement which they believe has been or will be affected by an Adjustment Board proceeding, they may bring their own proceeding before the Board for interpretation of their own contract as applied to this work. Railway Labor Act, Section 3 First (i). If they have no such contract, they may seek one in conference with the employer, and enlist the aid of the Mediation Board if needed. Railway Labor Act, Section 2 First and Second; Section 5. If the work they are then doing is as "embodied in agreements", the Railway Labor Act gives them the assurance of at least thirty days' notice of any proposed change, together with an additional period if the Mediation Board intervenes (Section 2, Seventh; Section 6).

It is obvious from the above that the real gravamen of the porters' suit is not that the Railway Labor Act has been violated, but that the Act contains no guarantees of automatic job security to employees who have not chosen to avail themselves of the abovementioned provisions. No one doubts that an employee who accepts employment under condition that his job and all the duties thereof are terminable at his employer's will has reason to fear that his employer may contract all or part of that job away to another. Such risks plainly inhere in any employment terminable "at will". We submit that neither the Constitution nor the Railway Labor Act was intended to remove such risks, and that a federal court should not undertake to do so by injunction.

IV.

This Court Should Decide Whether Review of an Adjustment Board Order May Be Had After It Has Been Settled by Agreement, at the Suit of Third Persons Brought More Than Two Years After the Order Became Effective.

A secondary basis for the Court of Appeals' holding that the Adjustment Board Award was void is on the theory that the Brotherhood's basic working agreement of 1926 was so badly misinterpreted by the Board that it amounted to a rewriting of the agreement, and in so doing the Board exceeded its authority (R. 305-306). The Court said that while some provisions of the agreement "may furnish a feeble basis for the contention that the brakemen under this contract were entitled to the disputed work," there was no room for doubt that the contract did not cover the head end braking duties (R. 306).

Of course this holding by the Court of Appeals merely substitutes its own interpretation for that of the Board, and is therefore a review of the Board's Award on its merits. Before considering certain jurisdictional objections to this action, two factual elements not mentioned in the Court's opinion should be noted:

First, the Court had only a few excerpts from the 1926 contract before it (R. 241-242) and none of the provisions which had been relied on by the Brotherhood in the Board proceeding (R. 226).

Second, the subject matter of the Board's Award was, among other things, settled by the April 27, 1944 agreement before the Santa Fe withdrew its petition for rehearing (R. 134), wherefore the soundness of the Board's interpretation became a moot question.

It is therefore clear, first, that judicial interpretation of a contract which the court has not read demands powers

of perception no court can possess, and second, that any review of the Board's action in interpreting the 1926 agreement which ignores the fact that the matter was settled by the parties can have little more than academic value.

But if we should assume that there was occasion to review the Board's Award on its merits, the question is whether the Court had authority to review it. Section 3 First (p) of the Railway Labor Act authorizes judicial review of an Adjustment Board order only at the suit of the petitioner or a person in whose favor the order was made, and Section 3 First (q) places a two-year limitation on such suits. This suit was brought by persons other than those in whose favor the order was made and more than two years after the Board's order became effective according to its terms (R. 1, 58).

It follows that the review of the Adjustment Board Award and Order undertaken by the Court of Appeals in this case has the effect of enlarging the jurisdiction of a federal court beyond the limits expressed in the applicable provisions of the Railway Labor Act. We submit that such action should be reviewed.

V.

This Court Should Decide Whether Rule 52(a) of the Rules of Civil Procedure Provides a Mandatory Requirement That a District Court Which Enjoins Performance of a Collectively Bargained Labor Contract Shall Make Findings of Fact and Conclusions of Law With Reference to the Contract Under Attack.

We have pointed out that the April 27, 1944 bargaining agreement between the Santa Fe and the Brotherhood, which specifically promised the disputed work to brakemen, was treated with complete silence in the Court of Appeals' opinion, it having received the same treatment

from the District Court in its findings and conclusions (R. 201-207). The District Court also omitted any findings or conclusions on issues such as the existence of a labor dispute and the porters' actual knowledge of the Board proceedings. The brakemen specified all such omissions as errors to the Court of Appeals (R. 253-256), but that Court refused to discuss the applicability of Rule 52(a) of the Rules of Civil Procedure (R. 317, 345).

The Court of Appeals' silence is especially significant because some of the issues passed over by the District Court were passed on by the Court of Appeals, and presumably they were considered by it to be material. An example is the issue of the porters' actual knowledge of the Board proceedings (R. 303). The inference is strong that the Court of Appeals considered that Rule 52(a) of the Rules of Civil Procedure provides a discretionary directive, rather than a mandatory requirement, that a District Court which issues a preliminary injunction shall "set forth the findings of fact and conclusions of law which constitute the grounds of its action."

We are satisfied for purposes of this question to rely solely on the failure of the District Court to make any finding or state any conclusion as to the April 27, 1944 bargaining agreement, which the porters put in evidence as part of their case (Plaintiffs' Exhibit 2, R. 153-154, 210-216). This agreement, which is obviously the heart of this whole controversy, would have resulted in assignment of brakemen to the disputed work had not the injunctional orders forbidden it (R. 163, 312-314).

It has been held that one of the chief objects of Rule 52(a) is to facilitate consideration of all material issues by a reviewing court. As this Court said in *Mayo* v. *Lakeland Highlands Can. Co.*, 309 U. S. 310, at 316:

"It is of the highest importance to a proper re-

view of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The evil which may flow from non-compliance is vividly illustrated here. The District Court has omitted any finding or conclusion concerning the most important of all issues in the case, and the Court of Appeals, instead of deciding this issue or remanding the case to the District Court for decision, has merely followed the District Court's lead by ignoring all questions raised by the April 27, 1944 agreement.

In so doing, the reviewing court has gone further. It has sown the seeds of inevitable confusion by coupling its silence as to the April 27, 1944 bargaining agreement with the statement in its opinion that the parties are "free to attempt to settle the dispute by collective bargaining" (R. 302). To the brakemen this makes the opinion self-contradictory because the above language indicates that the Brotherhood's right to make the April 27, 1944 bargaining agreement has been acknowledged (R. 312). To the Santa Fe it means the opposite (R. 329-330). To the porters, who, after introducing this contract in evidence, then saw disproved their charge that the Brotherhood forced it on the Santa Fe by threat of reprisals (R. 25, 167-168), the Court of Appeals quite properly omitted any reference to this "so-called" contract (R. 339-340).

We submit that unless Rule 52(a) was intended by this Court to contain only casual advice to a District Court which issues a preliminary injunction to make findings and state conclusions, this clearly is a matter calling for exercise of this Court's power of supervision.

VI.

This Court Should Decide Whether an Injunction Bond May Be Purposely Fixed in an Amount Representing Only a Small Fraction of the Defendants' Losses Merely Because the Judge Does Not Believe He Could Possibly Be Wrong in Issuing the Injunction.

The District Court fixed the injunction bond at $1,000 (R. 208). The undisputed evidence showed that losses of brakemen in wages alone, due to the injunction, accumulated at the rate of $900 per day (R. 145). Lost wages of brakemen may thereby be now estimated in excess of $350,000. This startling disparity might seem only an abuse of the trial court's discretionary power to fix the amount of the security, except that the trial judge volunteered his reason for requiring only a nominal amount: *he thought there was no merit in the defense* (R. 200-B). The brakemen assigned this as error (R. 256), but the Court of Appeals did not discuss the point in its opinion (R. 299-307).

For purposes of this question it does not matter whether the injunction bond should have been required of plaintiffs in compliance with Rule 65(c) of the Rules of Civil Procedure, requiring security for "the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," or under Section 7(e) of the Norris-LaGuardia Act, requiring security against costs, damages and attorney's fees "caused by the improvident or erroneous issuance" of the injunction (29 U. S. C. A. Section 107(e)). Either provision requires the enjoining court to assume the possibility of error in the issuance of preliminary injunctive relief and to protect those enjoined against this contingency, no matter how remote it may seem. To say

that the amount of protection should be measured by the apparent remoteness of the contingency is like appointing a trustee to handle a million dollars in cash but requiring only a hundred dollar bond because the court has great faith in the trustee's honesty.

The danger to the persons enjoined from this sort of speculation by the court with their damage claims is emphasized by the rule that wrongfully enjoined defendants are limited in their recovery against plaintiffs by the amount of the bond which the court, rightly or wrongly, saw fit to require. *International L. Garment Work. Un.* v. *Donnelly G. Co.,* 147 F. 2d 246 (8th Cir. 1945), certiorari denied in 325 U. S. 852.

Obviously, then, to the enjoined brakemen employees who stand to suffer irreparable wage losses due to the admitted inadequacy of the bond, this will be a matter of crescent importance for as long as the injunction order continues in effect.

We put our plea for the writ on much broader ground. The risk of injury through erroneous issuance of a preliminary injunction is enough for any person enjoined to bear, even with an adequate bond. Without such protection, the enjoined person is forced to carry the additional burden of defending himself without any hope of being made whole, even if his defense ultimately proves good. He therefore goes to trial with the certain knowledge that complete justice has been removed from his reach. We earnestly submit that the action of the trial judge, in deliberately withholding adequate security to those enjoined merely because he would not admit the possibility of his own error in issuing the injunction, calls for the exercise of this Court's supervisory power.

Conclusion.

For the reasons herein stated, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

April 5, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 705

C. D. SHEPHERD, ET AL.,
Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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May 17, 1949.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Introduction.

In view of the great length of respondents' briefs, we believe it would unduly extend this brief to reply to all matter appearing in the respondents' briefs. We shall therefore confine ourselves to a consideration of what we consider the three most important questions raised thereby, as follows:

1. Whether the Brotherhood of Railroad Trainmen, although a party to the contract enjoined herein and a party to the Adjustment Board Award nullified herein, was nevertheless properly omitted as a party defendant in this suit.
2. Whether there is any valid basis for reconciling the decision of the Seventh Circuit in this case, hold-

ing that one railroad labor group may properly be granted injunctive relief against performance of a labor agreement between the carrier and another group, and the decision of the Eighth Circuit in *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. 2d 4, holding that such relief may not be granted.

3. Whether Section 3 First (j) of the Railway Labor Act requires that the Adjustment Board, in considering a dispute between a carrier and a class of employees, must give formal notice of its hearings to employees in another class, although they have no right to intervene in the proceeding and have actual knowledge of its pendency.

SUMMARY OF ARGUMENT.

I. The Brotherhood as an Indispensable Party.

In their attempt to show that the Brotherhood was properly omitted as a party to this suit Plaintiffs-Respondents have denied that the Brotherhood was the party which won the Adjustment Board Award under attack in this suit, and have denied that the collective bargaining agreement made by the Brotherhood with the Santa Fe covering the disputed work is being enjoined by this suit. Both of these facts are so clearly shown by the record that it must be concluded respondents have no answer to the contention that the Brotherhood is an indispensable party, and that the District Court had no power to entertain this suit.

II. Conflict Between Seventh and Eighth Circuits.

Plaintiffs-Respondents have attempted to distinguish this case, in which one group of railroad employees has been granted injunctive relief against performance of a labor

contract between the railroad and another employee group, from the Eighth Circuit decision in *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d 4, in which such relief was denied, by insisting that the injunction granted here does not prohibit performance of any labor agreement. The record unquestionably shows that performance of the April 27, 1944 bargaining agreement between the Santa Fe and the Brotherhood has been enjoined, wherefore no ground has been shown for reconciling the decisions of the two circuits.

III. Notice and Knowledge of the Adjustment Board Proceedings.

Plaintiffs-Respondents' argument that the Railway Labor Act requires formal notice to the porters of the dispute between the Brotherhood and the Santa Fe before the Adjustment Board and that the porters' actual knowledge thereof was immaterial fully justifies the granting of the writ because this view, which was adopted by the Court of Appeals, would require the Board to give notice to persons it has no power to hear, and would put a premium on the practice, heretofore condemned by this Court, of employees' standing by with knowledge of a Board proceeding in order to attack any result which does not please them.

ARGUMENT.

I.

Reply to Respondents' Arguments Concerning the Brotherhood as an Indispensable Party.

We urged in our brief (pages 25-27) that the Brotherhood is an indispensable party to this suit for two principal reasons:

> First, because the Brotherhood is a party to the collective bargaining agreement of April 27, 1944 which specifically promises to brakemen the same work which the respondent porters seek by this suit to secure to themselves, and
>
> Second, because the Brotherhood was the party in whose favor the Adjustment Board Award which is attacked herein was rendered.

As for the April 27, 1944 contract, the porters have answered in their brief (page 53) that "The record fails to show that a collective bargaining agreement of any kind is involved in this suit * * *." The bargaining agreement the porters have lost sight of is their Exhibit 2 (R. 210-216). It is not merely involved in this case; it is the very heart of it, as will be shown in the next section of this reply brief. As for the Adjustment Board proceedings to which the Brotherhood was a party, the porters state in their brief (page 53) that "there is no Award appearing of record made in favor of the Brotherhood * * *." We find the award which the porters have lost sight of attached to the porters' complaint as their Exhibit A, which reads in part as follows (R. 58):

> "Parties to Dispute:
>
> Brotherhood of Railroad Trainmen.
>
> The Atchison, Topeka and Santa Fe Railway Company—Eastern and Western Lines."

This award was plainly entered as provided in Section 3 First (o) of the Railway Labor Act "in favor of petitioner," *i. e.*, the Brotherhood. It would thus appear that the porters, in their zeal to demonstrate that the Brotherhood was properly omitted as a party to this suit, have assumed the position of the legendary ostrich who, after burying his head in the sand, asks "Where is everybody?"

The Santa Fe's argument in its brief (pages 23-25) agrees with the porters that the Brotherhood was properly omitted as a party to this suit, but assigns different reasons. It points out that one of the affidavits offered by the individual brakemen defendants is signed by the General Chairman of the Brotherhood on the Santa Fe, and argues that since the Brotherhood has had actual knowledge of this suit and has not intervened, then to hold that the Brotherhood must be made a party would be to "permit litigants to play fast and loose" with the court (page 24). Of course the Santa Fe cites no authority for the proposition that unless an indispensable party displays his interest by applying for intervention, his rights may be adjudicated in his absence. As for the railroad's charge that there are litigants here who are trying to play fast and loose, the individual brakemen defendants are the only litigants in this case opposing the Santa Fe, so that criticism is apparently aimed at them. These defendants have maintained from the very beginning, in their answer, that the Brotherhood should be made a party (R. 92). It is curious that the Santa Fe, having also solemnly pleaded in its answer (R. 74) that the Brotherhood should be made a party, just as it now pleads the opposite, should choose this occasion to stress the importance of consistency.

We think the conclusion is inescapable that the respondents simply do not have an answer to our contention that the Brotherhood is an indispensable party to this suit.

This issue is obviously fundamental to the district court's jurisdiction to entertain the suit, and its determination is therefore a prerequisite to the further conduct of the case.

II.

Reply to Respondents' Arguments Concerning Conflict Between Seventh and Eighth Circuits.

The essential element of conflict between the Seventh Circuit's decision now sought to be reviewed and the Eighth Circuit's decision in *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d 4, certiorari denied in 334 U. S. 818, springs from the fact that in each case the carrier agreed with the brakemen's union to assign brakemen to certain braking duties which were then being performed by porters, whereupon in each case the porters brought suit to secure themselves in the disputed work by injunction. Any comparison made between the two decisions must therefore begin with a recognition that the relief granted in this case and denied in the *Randolph* case relates to an injunction against performance of labor agreements.

Of course, a refusal to acknowledge the existence and involvement of the labor agreement in the instant case can only tend to conceal the conflict between the two decisions; it will not reconcile them. Nevertheless, in their brief (page 1) the porters undertook a "more concise, accurate and complete" restatement of the case (pages 1-17) but did not mention the April 27, 1944 contract (Plaintiffs' Ex. 2, R. 210-216). It is obviously the dominant factual element in this case because it specifically covers the disputed work.

The apparent purpose of this omission is revealed at pages 49-50 of their brief, where the porters have flatly stated that the "injunction does not prohibit the enforcement of any labor agreement". This statement is the only

attempt at reconciliation between this decision and the *Randolph* decision. Let us compare this statement by the porters with the following colloquy between Chief Judge Major of the Court of Appeals and Mr. Milroy, attorney for the Santa Fe:

> "Judge Major: Well, isn't enforcement and recognition of that contract covered in this injunction? Under this injunction you can not go on and carry out this contract, can you?
>
> "Mr. Milroy: No, it is all wrapped up together, as I see it, because of the fact that it would not have been entered into except for the award. It was entered into in compliance with the award." (R. 312-313.)
>
> * * * * *
>
> "Judge Major: Well, the porters are getting this work now, aren't they?
>
> "Mr. Milroy: That is correct.
>
> "Judge Major: And I suppose the brakemen are being deprived of it as a result of the injunction issued.
>
> "Mr. Milroy: That is right.
>
> "Judge Major: As long as this injunction stands the porters will continue.
>
> "Mr. Milroy: That is right." (R. 314.)

The porters brought the April 27, 1944 contract as an issue into this case by charging in their complaint (R. 24-25) that it was made through "threats of reprisals" by the Brotherhood. Now that their own witness has admitted there were no threats of any kind (R. 167-168) and they no longer have any challenge to its validity, they would now have this Court join them in backing away from the issue on this bland assurance at page 45 of their brief:

> "We are not making an issue of any contract or so called collective bargaining agreements * * *".

The porters led the District Court into the manifest error of issuing the injunction order without any finding

or conclusion as to the April 27, 1944 contract. They also persuaded the Court of Appeals to affirm the injunction without mentioning the contract in its opinion. We cannot believe that this Court will be similarly induced to ignore the most vital element in the case, and thereby fail to recognize that the instant case is in direct conflict with the *Randolph* case.

The Santa Fe's brief (page 28) attempts to shrug off this issue with the suggestion "that the agreement would fall with the award." This theory supposes that since the agreement made in Chicago on April 27, 1944 did, among other things, settle the wage claims allowed by the Award and, according to the Santa Fe counsel's conjecture, the agreement "would not have been entered into except for the award" (R. 313), the contract was "impliedly" nullified by the Court of Appeals' decision that the Award was invalid (Br. 31). It is not surprising that the Santa Fe has cited no authority for the amazing proposition that an obligor who agrees to a compromise settlement of a disputed claim against him may thereafter litigate the disputed claim and be thereby released from his settlement agreement. The law is otherwise. As was said by the Supreme Court of Illinois in *Dougherty* v. *Duckles*, 303 Ill. 490, at 500:

> "A compromise of disputed claim made in good faith, whereby the claim is extinguished, is a sufficient consideration to support an agreement. Courts will not inquire into the merits of the claim to determine whether it could have been successfully maintained in a suit brought to enforce it. If the claim is entertained in good faith and the parties disagree as to its reasonableness or legality, its compromise affords sufficient consideration to support a promise or agreement."

It is therefore clear that the validity of the Santa Fe's agreement to assign brakemen to the disputed work does

not depend on the soundness of the Board's Award, and certainly not on the merits of the earlier dispute which the Santa Fe, after several months of collective bargaining, settled voluntarily by mutual agreement with the Brotherhood (R. 151, 167-168).

It is particularly important to note that this settlement by mutual agreement was made while the Santa Fe was still pressing its petition for rehearing in the Adjustment Board (R. 24), and while the carrier and the porters both considered the Award as not yet final (R. 161, 209). The Santa Fe's withdrawal of the petition for rehearing was not until a week *after* the settlement of April 27, 1944 (R. 134).

The history of the labor disputes which led to the agreements cannot change the ultimate fact that the agreements were made, or affect the right of the parties to make and perform them. In the *Randolph* case the agreement grew out of disputed claims which were settled in conference between union and carrier. In the instant case the agreement also grew out of disputed claims which were settled in conference between union and carrier. Is their right to make such a settlement through collective bargaining affected by the fact that some of the claims thus settled had been previously submitted to the Adjustment Board and were still being disputed there? Unless it can be based on this ground, we submit there is no room for distinguishing the two cases. None of the respondents has even suggested such a ground.

III.

Reply to Respondents' Arguments Concerning Knowledge and Notice of the Adjustment Board Proceedings.

The time has come, it is respectfully suggested, for this Court to settle the meaning of the Railway Labor Act provision for notice of hearings of the Adjustment Board as found in 45 U. S. C. A. Section 153 First (j):

> "* * * the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The brakemen pointed out at page 33 of their brief that if a craft of employees is not entitled to intervene in an Adjustment Board proceeding it is not entitled to notice of the hearing. At page 32 the brakemen cited the case of *Order of R. R. Tel.* v. *New Orleans, Texas & Mex. Ry. Co.*, 156 F. 2d 1 (8th Cir. 1946), certiorari denied in 329 U. S. 758, which involved the Board's denial of an application to intervene made by one labor group during the consideration of a contract between the carrier and another labor group.

Apparently conceding that this case would be decisive of the question of whether the porters would be entitled to notice under the Railway Labor Act, the plaintiffs-respondents at page 58 of their brief attempt to distinguish the cases on the facts as follows:

> "In the case at bar, there is no such jurisdictional dispute involved and the case is not applicable to the facts alleged in the verified complaint in the instant case, nor the relief prayed for and therefore does not conflict with *Nord* v. *Griffin*, 86 F. 2d 481, which is directly in point."

The present argument of counsel for the train porters is particularly interesting: During a hearing in the trial court the brakemen suggested that if the porters had really believed that they were involved in the Adjustment Board proceedings they should have sought to intervene after the issuance of the Award and during the two years in which they knew that the carrier had pending a petition for rehearing. This is the answer made by the attorney for the porters at the trial court hearing (R. 200-A):

> "* * * Counsel says we should have intervened in that case. I am not going to argue that. The Order of Railroad Telegraphers, 156 Fed. 2d, says that the mediation act, the Adjustment Board Order, only provides for disputes between employer and employees and not between employees."

Notwithstanding this admission of counsel for the porters that the present dispute is between employees, both the trial court and the Court of Appeals held that the present case is within the rule of *Nord* v. *Griffin*, 86 F. 2d 481, even though that was a case in which an individual employee was held entitled to notice and hearing in a proceeding because it involved the interpretation of his own working agreement as applied to his individual seniority status.

With respect to the effect of knowledge of the Adjustment Board proceedings the porters argue at page 57 of their brief:

> "The petitioners attempted to substitute their bare statement of actual knowledge when the law requires the Board to give notice to employees involved, we do not believe such will receive the sanction of this Honorable Court."

This Court has expressed its disapproval of the practice of an employee standing by with knowledge of the

Adjustment Board proceedings and thereafter coming into court to complain that he was not notified. *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 327 U. S. 661, at 666-667. Nevertheless, when the brakemen offered evidence in the trial court to show early actual knowledge it was excluded as immaterial (R. 258-263) and this ruling was tacitly approved by the Court of Appeals (R. 311-312, 345).

The Court of Appeals for the Seventh Circuit by its action has applied the Railway Labor Act provisions for notice of hearings of the Adjustment Board as follows:

> On hearings to interpret the collective bargaining contract of one craft the Board must give formal notice to employees of a rival craft although they could not intervene and be heard and although they have actual knowledge of the hearings. Failure to give such notice will void the Award.

Inasmuch as the Seventh Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court, this Court should state for the guidance of the railroad industry what is the correct interpretation of the Railway Labor Act provision for notice of hearings of the Adjustment Board as found in 45 U. S. C. A. Section 153 First (j).

Conclusion.

For reasons above stated, and those stated in our original brief dated April 5, 1949, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May 17, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 705

C. D. SHEPHERD, ET AL.,
Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,
Respondents.

BRIEF OF OBIE FAUSTER HUNTER, ET AL., PLAINTIFFS-RESPONDENTS, IN OPPOSITION TO THE PETITION OF C. D. SHEPHERD, ET AL., DEFENDANTS-PETITIONERS, FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

It is believed that a more concise, accurate and complete statement of the case than has been afforded by the petitioners will be of assistance to the Court.

Synopsis and Outline of Complaint.

Verified Complaint of Plaintiffs-Respondents (R. 2-65).

The complaint as shown by the record includes a verification and several affidavits in support of the complaint (R. 46-58) and exhibits attached to the complaint (R. 58-65).

As shown by the verified complaint this suit was brought to enjoin the enforcement of an Award by the National Railroad Adjustment Board, (hereinafter referred to as the Board,) First Division, entered April 20, 1942, which Award was based upon a hearing without notice to and without giving the Plaintiffs-Respondents an opportunity to appear and defend as provided by the Railway Labor Act, Section 3 (j), although the Plaintiffs-Respondents were persons involved and were substantially affected by the order and Award, in that the Plaintiffs-Respondents, by said Award, would lose the positions held by them as a class for more than forty years, and thereby suffer reduction of their wages, hours of employment and the right to earn a livelihood without an opportunity to defend themselves (R. 42-45).

Plaintiffs-Respondents, (hereinafter referred to as plaintiffs,) are composed of a group of persons employed by the Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, and have been employed as a class by said Santa Fe continuously since 1899.

Defendants-Petitioners, F. W. Coyle, as Vice-President of the Brotherhood of Railroad Trainmen, (hereinafter called the Brotherhood,) C. D. Shepherd, J. W. McDonald, E. F. Allen, M. L. Pennebaker, C. E. Martz and J. J. Kain, as members of the Brotherhood of Railroad Trainmen, (hereinafter referred to as white brakemen, defendants,) are employed by the Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, as Railroad Trainmen. The group who are members of the Brotherhood of Railroad Trainmen are composed of all white persons (R. 4, 5).

Defendant-Respondent, The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, (here-

inafter referred to as the Santa Fe,) is a Corporation engaged in interstate commerce by railroad within the meaning of the Act of Congress relating thereto (R. 4).

There are other defendants in the District Court.*

The Plaintiffs, during the forty-three years of continued service and employment as a class by the Santa Fe, at first designated as train porters and later became known as porter brakemen, have at all times been considered trainmen because of the class of work they were expressly employed to perform for the Santa Fe (R. 11, 14). That this group of train-porters or porter-brakemen were solely composed of American citizens of Color and they were selected from the chair car or parlor car attendants when vacancies occurred in their class (R. 16, 17). Prior to June 1, 1918, they were paid wages less than the amount paid the white brakemen although they were performing, as a part of their work as trainmen, some of the same services being performed by the white brakemen (R. 14, 15). June 1, 1918, the Director General of Railroad entered an order that all Colored men who were performing the same services as trainmen, should be paid the same rate of wages as paid to white men in the same capacities (R. 17).

There were separate seniority rosters for the plaintiffs and the white brakemen (R. 15, 62, 63). Separate pools were made and vacancies filled from the separate pools, but no interchange of work between the plaintiffs and the white brakemen, in their employment (R. 64, 65).

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*The National Railroad Adjustment Board, First Division, the individual members of said Adjustment Board, the referee, James B. Riley, who participated in the hearing and Award before the Adjustment Board, and T. S. McFarland as Secretary of the National Railroad Adjustment Board, First Division, were made parties to the suit in the District Court but were not parties to the appeal to the Circuit Court of Appeals, Seventh Circuit, or parties to this proceeding, as the interlocutory injunction was not issued against them (R. 4).

The void Order and Award of April 20, 1942, will cause irreparable damage and injury to the contracts of employment and the enforcement of which will cause plaintiffs to be replaced, reduced, furloughed, or discharged wrongfully. They constitute but one class or craft of employees (R. 7-8).

Plaintiffs who were created as a class or craft and employed to do certain duties, were known as train porters, were peacefully executing those duties to the satisfaction of their employer, the Santa Fe, until the unlawful interference by the Brotherhood through the void order and Award of April 20, 1942. Their employment was continued through custom, practice, usage and contract at will, continuously since 1899. That prior to 1899 a Labor organization known as the Brotherhood of Railroad Trainmen, exclusively white, was the bargaining agent of the white brakemen. These brakemen operated the freight trains of the Santa Fe and one white brakeman was on the rear end of the passenger trains, he was known as the flagman. The plaintiffs' employment was limited to the head end of the passenger trains during the entire period of their employment. Both groups were employed by the Santa Fe (R. 11-13).

A book of rules and regulations was issued, further defining the work of the plaintiffs. Plaintiffs received certain wages under the contract of employment which increased with their years of service. The relationship between the plaintiffs and white brakemen from 1899 was amicable and there was no interference by the white brakemen with the plaintiffs, in the performance of their services, as the brakemen were receiving more wages and salary than the plaintiffs. Additional property rights were created and vested in the plaintiffs as a class and craft under the customs, usages, accepted practices and contract

with the Santa Fe, relative to seniority rights, which seniority rights gave the plaintiffs certain preference to choice runs. These seniority rights only applied to the plaintiffs as a class. There were separate seniority rosters for the plaintiffs. Plaintiffs were required to take the same type of examinations as the white brakemen, and a part of the class and craft of the plaintiffs were known as chair car attendants who were promoted to vacancies in the ranks of the plaintiffs. Upon reduction of the plaintiffs, by reason of the lack of work, they returned to chair car attendants at the head of the list, and the order and Award would cause the porters to take the place of the chair car attendants by this reduction, chair car attendants would be discharged or furloughed and some of the plaintiffs would be discharged or furloughed solely by reason of the void order and Award (R. 14-17).

That the order and Award was void as being in excess of the jurisdiction of the Board. That December 2, 1918, the Director General of Railroads entered General Order Number 27, effective June 1, 1918, which stated that Colored men employed as trainmen should be paid the same rates or wages as paid white men in the same capacity. That the plaintiffs are now and have always been trainmen since 1899. That from the effective date of said order, the plaintiffs and the white brakemen received the same pay and were under the same working conditions, as both groups had been performing the same kind of work for the Santa Fe, except that the plaintiffs had additional work which was not required of the brakemen (R. 17-18).

That after this raise in the wages of the plaintiffs, the white brakemen filed a claim with the Train Service Board of Adjustment for the Western Region, which Train Service Board was established under an agreement of the

brakemen and the Railroad Company, pursuant to Title 3, Section 302, of the Transportation Act, 1920. The claim made by the brakemen was that certain work being performed by the plaintiffs, such as the work on the head end of the passenger trains of the Santa Fe, violated the schedule of rules and agreements made on behalf of the white brakemen through the Brotherhood of Railroad Trainmen and with the Santa Fe. The white brakemen were fully represented at the hearing and the claim was denied as evidenced by Decision 2126. A claim was again filed on behalf of the brakemen, claiming that the same work being performed by the plaintiffs violated the schedule of rules between the white brakemen and the Santa Fe. This claim was again denied. The Memorandum Agreement between the representatives of the white brakemen and the Santa Fe provided that the decision of the Train Service Board would be final when approved by a majority vote of the full membership of the Train Service Board. These decisions of the Train Service Board were approved by a majority vote of the full membership (R. 18-20).

That the Brotherhood of Railroad Trainmen have at all times since 1899, and prior thereto, been the duly authorized representative of the white brakemen, acted in their behalf, and well knew the positions and jobs held by the plaintiffs on the passenger trains of the Santa Fe, and at about May 3, 1939, without any notice to any of the plaintiffs and without the plaintiffs having an opportunity to be heard in their defense, did file with the National Railroad Adjustment Board, First Division, Chicago, Illinois, a claim stating that the plaintiffs were performing work for the Santa Fe, which work violated their schedule of rules, although they did not name the plaintiffs in the claim. This was the same claim which had been adjusted

on two occasions by the Train Service Board of Adjustment for the Western Region, under Decisions 2126 and 2336. The Brotherhood of Railroad Trainmen and all members of the class of brakemen represented by them, well knew of the prior adjustment of their claim which had been adversely adjudicated against them and in favor of the plaintiffs, and further had knowledge of the fact that any claim they had concerning wages, rates of pay and working conditions, was exclusively within the jurisdiction of the Mediation Board, under the Railway Labor Act. That the brakemen had further knowledge of the fact that the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of *Nord* v. *Griffin*, 86 Fed. (2d) 481, a case in which the Brotherhood of Railroad Trainmen, as a representative of the switch tenders, Chicago Union Station, was interested in said suit and had full knowledge that an order and Award entered by the Adjustment Board, First Division, without any notice to and without an opportunity to be heard by all employees involved, as required by the Railway Labor Act, Section 3 (j), was void. It was further alleged in said complaint that the order and Award entered by the Board against the plaintiffs without notice or an opportunity to be heard was void, because the effect of said order was to deprive the plaintiffs of their rights under the 5th Amendment of the Federal Constitution, deprive the plaintiffs of their rights to earn a livelihood and to continue to fulfill their contracts of employment with the Santa Fe, and was an unlawful interference for which they had no adequate remedy at law. That the controversy between the Santa Fe and the brakemen through the Brotherhood was based upon an agreement of December 1, 1926 (R. 61), of which Article XXIX expressly exempted the porters from its application (R. 21-23).

That the proceedings before the Adjustment Board resulted in the Award of April 20, 1942, and was agreed to by 5 Labor Members of the Board and the Referee, with the dissent of 5 Carrier Members, as shown by Exhibit "A" (R. 58). That 5 Carrier Members filed a written dissent (R. 60-62), as shown by Exhibit "A-2". A petition for rehearing was filed by the Carrier (R. 24) which was not passed upon by the Adjustment Board because the 5 Labor Members and the Referee refused to reconvene or hold any meeting for that purpose, which petition for rehearing remained undisposed of for about two years, when the Santa Fe was compelled to withdraw the same and to enter negotiations with the Brotherhood, as the representative of the brakemen, to carry out the terms of the void Award of April 20, 1942. That upon the Award becoming final by the withdrawal of the petition for rehearing, to-wit, May 3, 1944, the plaintiffs were without any remedy, except in a Court of Equity, to have the void Award set aside (R. 23-25).

The Brotherhood and the brakemen well knew that the plaintiffs as a class, for more than 40 years before the filing of the complaint with the Adjustment Board, by usage, custom, accepted practice and contracts of employment with the defendant carriers, had been continuously performing the services for which they had been employed, and further knew that the rates of pay, rules, wages, and working conditions of the plaintiffs had been re-established in 1919 by General Order No. 27, issued by the Director General of Railroads, and further knew that the plaintiffs were persons involved under Section 3 (j) of the Railway Labor Act, because the Award would and did affect the rates of pay, wages, rules, working conditions, and positions which had continuously been held by the plaintiffs

and further knew that the plaintiffs, by reason of the positions and jobs held by them, were controlled by the Railway Labor Act and the Executive Orders No. 9299, February 4, 1943 and No. 9172, May 22, 1942. They further knew that the plaintiffs were entitled to continue in their employment at the will of the Santa Fe without unlawful interference on the part of the said brakemen. In disregard of the vested rights of the plaintiffs, the rules and regulations of the Executive Orders of the President, and in disregard of the Constitutional Rights of the Plaintiffs, which prohibits the deprivation of persons of their property and property rights without due process of the law as guaranteed by the 5th Amendment of the Federal Constitution, and against equity and good conscience and in violation of the provisions of the Railway Labor Act did, by their acts and conduct, unlawfully interfere with the vested property rights of the plaintiffs, to the irreparable damage and injury of the plaintiffs, by the enforcement of the Award (R. 25-27).

Prior to the acts of the brakemen in obtaining the void Award, the plaintiffs by usage, custom, accepted practice and their contracts of employment with the Santa Fe, had for more than 40 years enjoyed certain rights, to-wit: To continue their employment as train porter-brakemen, with the Santa Fe, and as chair car attendants, so long as they were fit and able to bid for assignments for positions against members of their class only; to receive the average rates of pay to which their positions entitled them (Exhibit "C"); to remain in the continuous employ of the employer until they had reached the age of 65 years, at which time they would be entitled to retire upon a substantial pension during the remainder of their lives under the Railroad Retirement Act, but if the void order is enforced they would lose all of the above benefits and other

benefits mentioned in this complaint. That millions of dollars will be lost to them by the enforcement of the void order. That solely by reason of the enforcement of the void Award by the Santa Fe, and solely by the insistence of the brakemen through the Brotherhood, as their representative, the Santa Fe, in order to avoid the penalties as provided by the Railway Labor Act, have been compelled to issue an order to withdraw from services all of the plaintiffs as head end porter brakemen on all trains of the Santa Fe, although the plaintiffs are fit and able to continue the performance of their contracts with the Santa Fe in accordance with the terms of their employment which, among other things, provided that so long as the plaintiffs were fit and able to do said work and perform the duties for the Santa Fe, for which they were employed they would continue in their employment. That the said work of the plaintiffs has been satisfactorily performed and the relationship between the plaintiffs and the Santa Fe has at all times been amicable and agreeable to their employer (R. 27-30).

Specific instances are set forth showing the names of the plaintiffs who have been removed under the void order and Award and replaced by the brakemen who are members of the Brotherhood. That orders have been issued throughout the Santa Fe system by reason of the void order and Award, showing that the Santa Fe, at the insistence of the Brotherhood, representing the defendant brakemen, were complying with the void order and Award to the damage and injury of the plaintiffs, which compliance is solely at the insistence of the defendant brakemen through the Brotherhood (R. 30-35).

That no notice of any kind was given to the plaintiffs of the filing of the complaint or other proceedings before

the Adjustment Board, initiated by the brakemen through the Brotherhood, to deprive the plaintiff of their property rights, and plaintiffs were neither represented nor afforded an opportunity to be represented either in person, by counsel, or by other representatives, as by Subsection (j), Section 3, of the Railway Labor Act is required. That Section 3, Sub-section (h), nor any other Section conferred upon the Adjustment Board or the Santa Fe, any right, power, authority or jurisdiction to alter, to abrogate, to deal with or determine the rights and status of the plaintiffs except as provided by the Railway Labor Act, which gives such power to the Mediation Board (R. 35).

Various reasons are alleged to show the invalidity of the order and Award as against the plaintiffs by allegations, showing that the property rights of the plaintiffs, including the seniority rights acquired by the plaintiffs through more than 40 years of continued service with the Santa Fe, would be destroyed without the due process of law, and that the plaintiffs, having no remedy at law, were compelled to seek injunctive relief in the Court of Equity to prevent the enforcement of the void order; that without an injunction being issued they would suffer irreparable damage (R. 36-43).

The relief prayed is that a temporary injunction be issued to preserve the status quo and that on final hearing, a permanent injunction be issued. The plaintiffs prayed that the order and Award of April 20, 1942, which was entered without notice to them and without an opportunity to appear and defend as provided by Section 3 (j), of the Railway Labor Act, be declared null and void and set aside by a decree of the Court (R. 43-45).

The complaint is verified by the affidavits of six of the plaintiffs who had knowledge of the facts (R. 46-58).

There are seven Exhibits attached to the verified complaint (R. 58-65).

In further support of the temporary injunction order, the affidavit of James M. Jackson, one of the plaintiffs, was submitted to the court (R. 66-72).

Pleadings (R. 72-101).

The answer of the Santa Fe (R. 72-80) was unverified and expressly admitted that it did not give notice to the plaintiffs (R. 78). The answer of the petitioners (R. 90-101) was unverified and in said answer they allege that the *plaintiffs were not entitled to any notice of the hearing* before the National Railroad Adjustment Board (R. 95, 96, 100).

Proceedings On Temporary Injunction of October 31, 1944.

After service of summons and notice on the defendants, those served filed appearances and a temporary injunction was issued, although it is designated "Temporary Restraining Order" (R. 86-89). A transcript of the proceedings on the hearing for the temporary injunction appears in this record (R. 80-85).

July 10, 1947, the petitioners made a motion to vacate and dissolve the temporary injunction of October 31, 1944 (R. 117-124). They filed a supplemental Memorandum motion. The answer or reply to the motion by the plaintiffs does not appear in the record, however, after briefs had been filed, the trial court gave a memorandum opinion December 12, 1947 (R. 128-132).

Further Injunctive Proceedings in the District Court.

January 16, 1948, findings of fact, conclusions of law and a temporary restraining order was issued by the trial court (R. 135-143). A hearing for temporary injunction was set for January 26, 1948 (R. 148), which began on said date and ended January 29, 1948 (R. 148-200B). At the close of the hearing on the motion for the interlocutory injunction, the court ordered the preparation of findings of fact, conclusions of law and order for the issuance of the interlocutory injunction which is the subject of this suit (R. 201-208).

Evidence On Hearing for Interlocutory Injunction (R. 148-200-B).

This Honorable Court has repeatedly held that an application for an interlocutory injunction is addressed to the sound discretion of the trial court and that an order granting such an injunction will not be disturbed by an Appellate Court unless the discretion is improvidently exercised and has further held that the duty of the Court of Appeals, upon an appeal from such an order is not to decide the merits of the controversy, but simply to determine whether the discretion of the court below has been abused. *Alabama* v. *United States,* 279 U. S. 229, 231, 73 L. Ed. 675, 677, 49 S. Ct. 226. The trial court in order to exercise its sound discretion in hearing evidence on the motion for the interlocutory injunction, had a right to consider whether or not the plaintiffs had made a sufficient showing on the question involved in the case, which was whether or not the Order and Award of the Adjustment Board was void, the said order having been entered without Notice to the plaintiffs, who were employees involved within the meaning of Section

3 (j) of the Railway Labor Act and as required by said section and without an opportunity for them to appear and defend, which deprived the plaintiffs of the right to continue in the employment of the Santa Fe, which employment they had held for forty years continuously without unlawful interference, and received the benefits therefrom. The Court also had the right to consider the danger of immediate irreparable damage and loss, that the plaintiffs would receive under the circumstances, unless the interlocutory injunction immediately issued.

The plaintiffs called as a witness, S. C. Kirkpatrick (R. 150-184), Vice-President of the Santa Fe. He is the highest officer of the Santa Fe, hearing claims, appeals and disputes concerning employees of the Company. He had personal knowledge of the Award No. 6640, Docket No. 7400, which Award is involved in this case. He testified that prior to the Award of the Adjustment Board, the plaintiffs had been assigned as porter-brakemen for the Santa Fe and that after the Award and before the injunction was issued, some of the plaintiffs were replaced to comply with the Award No. 6640 of the Adjustment Board (R. 155). In further compliance with the Award of the Adjustment Board and at the insistence of the brakemen (R. 209, 216, 217), defendants through their representative, the Brotherhood, several of the plaintiffs had been replaced and removed from their positions (R. 154). He further testified that if the injunction and restraining orders had not been issued, the Santa Fe would have reduced the wages, changed the working conditions of the plaintiffs, and removed them from their positions as train porter-brakemen solely to comply with the Award (R. 164).

Mr. T. S. McFarland, Secretary of the Adjustment Board, was called as a witness by the plaintiffs (R. 184-200). He testified that he had been the Executive Secre-

tary of the Board since its organization in 1934, and was the keeper of all official records of the Board since that time. That it was his duty to send out notice under the Railway Labor Act when claims were filed, to all persons involved; that no notice of any kind was sent to any of the plaintiffs concerning the claim filed in 1939, which resulted in the Award affecting positions held by the plaintiffs (R. 185). That the records of the Board show that on May 3, 1944 a letter was received from the Santa Fe requesting a withdrawal of the petition for rehearing.

The petitioners offered no oral testimony and there was no contradiction of the testimony of Mr. Kirkpatrick and Mr. McFarland. The court having considered the verified complaint and affidavits in support thereof, with the oral testimony offered by the plaintiffs, found that Section 3 (j) which required notice to all employees involved, had been disregarded. Several written documents were introduced by the plaintiffs and petitioners but neither showed that any notice, as required by Section 3 (j) of the Railway Labor Act, had been given the plaintiffs.

Petitioners Appeal to the Circuit Court of Appeals, for the Seventh Circuit, and the Issues There Decided.

On March 2, 1948, petitioners filed their Notice of Appeal, "from the preliminary injunction order entered in this cause February 6, 1948" (R. 250, 251). On December 14, 1948, the United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion (R. 299-307) and affirmed the judgment of the District Court. December 28, 1948, the petitioners filed a petition for rehearing (R. 309-319). January 7, 1949, the Santa Fe filed its answer to the petition for rehearing (R. 321-333) and on the same date, the plaintiffs filed their answer to the petition for rehear-

ing (R. 335-343). On January 14, 1949, the petition for rehearing was denied (R. 345).

In its opinion (R. 299-307), the Circuit Court of Appeals held, that on the appeal before them, the contention that the appeal involved a jurisdictional labor dispute, such question was not involved and that the Norris-LaGuardia Act was not an issue before the court (R. 301-302). They further held that the order, appealed from the court below, had awarded certain disputed work to the porters, was not the case and stated (R. 302):

> "The only issue below, as well as here, is whether the order of the Board is void for failure to give plaintiffs notice of the proceeding, as alleged in their complaint and as found by the court."

The court found that no notice, as required by Section 3 (j) of the Railway Labor Act, had been given the plaintiffs of the proceedings before the Board, and that the plaintiffs were employees involved within the meaning of the Railway Labor Act, Section 3 (j), and were entitled to notice, because the plaintiffs had an interest in the work and were adversely affected by the Award. The court further held that the Award was void as to the rights of the plaintiffs because they received no notice and were deprived of an opportunity to be heard (R. 304). The court also held that the District Court had jurisdiction to determine the validity of the Award and it distinguished the cases, *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, and *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. (2d) 4, and held that they were not applicable to the case at bar (R. 304). The court stated (R. 304-305):

> "The instant case is distinguishable because it is an attack only upon an Award which has been made. It is not sought to obtain a judicial ruling as to the rights of the parties to the disputed work and, as already shown, the order appealed from does not pretend to

make such an adjudication. The rights of the parties under the order invalidating the Award are neither determined nor changed. They remain just as they were before the Award was made."

The court held that the Brotherhood of Railroad Trainmen was not an indispensable party to the suit (R. 306). The court in making plain the grounds of its decision on the appeal states (R. 306):

> "While we are of the view that the Award is void because the Board exceeded its authority, *we place our decisions primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their Constitutional right to a hearing was denied.*" (Emphasis ours.)

It ruled that the other points, which were raised by the petitioners, were not before it (R. 301).

SUMMARY OF ARGUMENT.

I.

The United States Court of Appeals decided all questions properly before it and properly refused to consider issues not presented by petitioners' appeal.

The Court of Appeals fully decided the propositions of law properly presented on the record in the case which was an appeal from an order granting an interlocutory injunction by the District Court, solely for the purpose of preserving the status quo. The questions decided by the Court of Appeals were, namely:

1. That an Award entered by the National Railroad Adjustment Board, First Division, was void as to the rights of the plaintiffs because they were persons involved within the meaning of the Railway Labor Act, Section 3 (j), and were not given any notice of the proceedings or afforded a right to appear and defend as provided by said Railway Labor Act; that they were not made parties to the proceedings and that the Award, which deprived them of their property rights, was in violation of the 5th Amendment of the United States Constitution.

2. That the provisions of the Norris-LaGuardia Act prohibiting the issuance of an injunction except under certain circumstances was not an issue in the instant case on the record.

3. That the question of a jurisdictional dispute, determinable only by negotiation, mediation, or arbitration, as provided by the Railway Labor Act, was not an issue before the court, on the record.

4. That an issue in the trial court, as well as on the appeal, is whether the Award of the Board is void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found by the Trial Court.

5. That the Brotherhood of Railroad Trainmen, as representatives of the petitioners, who were sued as a representative of a class, was not an indispensable party, because having actual knowledge of pendency of the suit it could have made an application for intervention had it been desirous to so do.

The petition for a writ of certiorari should be denied because (1), the decree is not a final one and (2), none of the reasons as shown by Rule 38 of the United States Supreme Court or as set out in the decisions of this court, appear in the record, or from the decision of the United States Circuit Court of Appeals sought to be reviewed. Rule of United States Supreme Court, No. 38; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 60 L. Ed. 629, 633, 634.

The questions of which the petitioners claim the Court of Appeals failed to pass upon were not properly before the court on an appeal from an interlocutory injunction.

The interlocutory injunction has in fact preserved the status quo as it had existed for more than forty years prior to the Award and it was proper that the court should retain the injunction and defer consideration of the questions concerning the merits of the case until a hearing on the merits had been reached.

II.

The decision of the Court of Appeals that the Norris-LaGuardia Act was not an issue on the appeal from the granting of the preliminary injunction was proper and there is no occasion for this Court to review the same.

The Court of Appeals having held that the only issue below in the Trial Court, as well as in the Appellate Court, was whether the order of the Board was void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found by the court, and further considering that this suit was not for the purpose of determining a labor dispute or to interpret a collective-bargaining agreement, but was simply a suit in equity to set aside a void Award, correctly held that the Norris-LaGuardia Act did not apply to the issuance of the interlocutory injunction.

Nord v. *Griffin,* 86 F. (2d) 481, 483, 484, (7th Cir. 1936,) in which the identical question was decided by the Seventh Circuit Court of Appeals, it was held that an Award without notice to employees involved, which notice is required by the Railway Labor Act, Section 3 (j), was void and that the proper method of attack was a suit in equity in the District Court.

Lane v. *Union Terminal Company,* 12 F. Supp. 204, 205, in which case the court held that a citizen has a right to invoke the general jurisdiction of a court of equity in the protection of his constitutional rights. The court having held that this case did not involve a labor dispute, the Norris-LaGuardia Act was in no ways applicable. We will later discuss its inapplicability when we distinguish the cases relied upon by the petitioner.

III.

The question of a jurisdictional dispute, determinable only by negotiation, mediation or arbitration as provided by the Railway Labor Act, was properly held by the Court of Appeals as not an issue before the court on the record.

As heretofore stated, the question of a jurisdictional dispute does not appear from the record in this case and was properly held by the Court of Appeals not to be an issue on the appeal from the granting of an interlocutory injunction. The rule is well settled that on an appeal from an interlocutory injunction involving discretion, that the order will not be reversed unless it appears there was a clear abuse of such discretion by the Trial Court. There being no contradiction appearing in the record of the allegations, that Section 3 (j) of the Railway Labor Act had been entirely disregarded in the proceeding which resulted in the Award, the trial court had not only a right but a duty to preserve the status quo until the merits could be determined. This doctrine is so elemental that a mere statement of the same, we believe, will suffice. We were compelled to make a lengthy statement of the facts set forth in the bill in order that this Honorable Court could see that no such issue is involved.

IV.

The only issue in the trial court, as well as on the appeal, is whether the award of the Board is void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found from the facts by the trial court.

This proposition of law we urge is elemental and under the state of the record the trial court having considered the verified complaint, several affidavits in support of the same and the positive testimony of Mr. T. S. McFarland, Secretary of the Board, that he did not give notice to the plaintiffs, and the positive testimony of Mr. S. C. Kirkpatrick, Vice-President of the Santa Fe, that without the issuance of the interlocutory injunction in this suit, his company would have been compelled to enforce the void Award immediately, all of which was uncontradicted, it will be readily seen that the only issue before the court was the validity of the Award and the necessity for an interlocutory injunction to preserve matters in status quo.

V.

That the Brotherhood of Railroad Trainmen as representatives of the petitioners, who were sued as representatives of a class, was not an indispensable party, because having actual knowledge of the pendency of the suit, it could have made an application for intervention had it desired so to do.

The Vice-President of the Brotherhood, an unincorporated association, and several of its members who were served within the district were parties to the suit. The

Brotherhood is not an inhabitant or resident of this district and as has recently been held by this court, can only be sued in Cleveland, Ohio. The Award did not affect the Brotherhood nor take anything away from the brakemen defendants, and ample authority, as enunciated by this Honorable Court, has held that such intervention was proper if applied for, and the court made no finding as to its interest in the law suit.

VI.

The petition for a writ of certiorari should be denied because (1), the decree is not a final one and (2), none of the reasons as shown by Rule 38 of the United States Supreme Court or as set out in the decisions of this court appear in the record or from the decision of the United States Circuit Court of Appeals sought to be reviewed.

We appreciate the fact that the question of review by certiorari is entirely left within the discretion of this Honorable Court, however, we urge that the issue involved in this case is so elemental and fundamental and that this Honorable Court has heretofore considered the same in *Nord* v. *Griffin*, 86 F. (2d) 481, (7th Cir. 1936,) in which this sole point was decided by the Circuit Court of Appeals and the Award set aside as being void. An injunction having been issued by the District Court, affirmed by the Court of Appeals and certiorari was denied by this Honorable Court, 300 U. S. 673, 81 L. Ed. 879. We urge that since this question has heretofore been decided, no question of public interest or general importance is involved; that no conflict between the decisions of state and federal courts or between federal courts of different circuits has been shown by the petitioners to bring this case within Rule 38

of this Honorable Court or the decision in *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Company*, 60 L. Ed. 629, 633, 634, we respectfully urge that the petition for writ of certiorari in this case be denied.

VII.

Petitioner has no cause to complain of the injunction bond, as an interlocutory injunction bond is to be fixed in such sum as the court deems proper.

We believe this proposition of law is so well fixed by Rules of Civil Procedure that it is unnecessary to elaborate upon the same.

ARGUMENT.

I.

The United States Court of Appeals decided all questions properly before it and properly refused to consider issues not presented by petitioners' appeal.

The petitioners state seven questions which they claim are presented by its petition (pp. 11-13), assign six reasons for the allowance of the writ (pp. 14-17) and make six specifications of error (pp. 19-21). We do not believe it will assist the court in making an extended argument concerning the questions raised, the errors assigned and the specifications of error appearing in the petition, as many of them attempt to present matters which do not appear in the record and if they did appear in the record, would not be proper to consider on the merits. The petitioners seems to lose sight of the fact that the subject matter presented by the record concerns an appeal from an interlocutory injunction and this court and all other Federal and State courts following the principles of Federal practice have held:

> That on a review of an order granting or denying an interlocutory injunction the pertinent principles of equity as heretofore understood, are not to be disregarded.

This Honorable Court in *Alabama* v. *United States*, 279 U. S. 229, 231, 49 S. Ct. 226, 73 L. Ed. 675, 677, states:

> "It is well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; that an order either granting or denying such an injunction will not be disturbed by an Appellate Court unless the discre-

tion was improvidently exercised. (Citing Cases.)" • • • "The duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused. (Citing Cases.)"

From a casual examination of the verified complaint in this cause as shown by the record (R. 2-45) and in particular the prayer for relief (R. 43), it will be observed, the relief prayed is to decree the Award of April 20, 1942, void for the reasons set forth in the verified complaint. The Court of Appeals for the Seventh Circuit, in *Independent Cheese Co.* v. *Kraft Phenix Cheese Corp.,* 56 F. (2d) 575 and *Federal Trade Commission* v. *Thomsen-King & Company,* 109 F. (2d) 516, 518, and in an unbroken line of decisions has followed the principles of law laid down by this Honorable Court in *Alabama* v. *United States,* 279 U. S. 229. The petitioners make no effort to show that the District Court abused its discretion by the issuance of the interlocutory injunction and made no sworn denial to the allegations of the verified complaint and the evidence presented by the plaintiffs, that no notice had been given the plaintiffs, who were persons involved and they would be adversely affected by the Award, although the Railway Labor Act, Section 3 (j), required that a notice be given.

We do not believe that it can be overlooked that the petitioners in the full hearing on the issuance of the interlocutory injunction failed to offer any evidence to contradict the question of lack of notice to the plaintiffs. In other words, they are attacking an order which is supported by a sworn complaint, sustaining affidavits and oral testimony presented in open court, without anything on their side to dispute the facts therein set forth. Their fact assertions are not supported by pleading, affidavits or oral testimony.

Federal Trade Commission v. *Thomsen-King & Company*, 109 F. (2d) 516, 518.

The real questions properly raised and decided by the Circuit Court of Appeals involved no question of public interest and general importance and no conflict with any decisions. As the Circuit Court of Appeals has followed the regular course of procedure and well-established principles of law, no ground is shown why certiorari should be granted, as this jurisdiction is exercised sparingly, in cases of peculiar gravity and in extraordinary cases. This case does not come within the rules laid down for the granting of petitions for writs of certiorari.

II.

The decision of the Court of Appeals that the Norris-LaGuardia Act was not an issue on the appeal from the granting of the preliminary injunction was proper and there is no occasion for this court to review the same.

As appears from its opinion (R. 301-302), the court of appeals plainly stated that on the record of the appeal which was an appeal from an order granting an interlocutory injunction and the question of a jurisdictional dispute was not an issue and further viewing the case as a suit in equity to protect constitutional rights from invasion by a void enactment that such an issue was not before the court on this appeal and the court states (R. 301-302):

> "The defendant brakemen raise and discuss many issues which we think are beside the point. They argue, for instance, that the dispute is jurisdictional, determinable only by negotiation, mediation or arbitration, as provided by the Railway Labor Act, and that the court was without authority to issue the injunction because of a failure on the part of the plain-

tiffs to comply with the Norris-LaGuardia Act. *We are of the view that such issues are not before us.* (Emphasis ours.) They are raised, as we understand, on the theory that a labor dispute is involved and that by the order appealed from the court below has awarded the disputed work to the porters. Such is not the case. The only issue below, as well as here, *is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding, as alleged in their complaint and as found by the court.* (Emphasis ours.) And a holding in favor of the plaintiffs means nothing more than that the porters and the brakemen are relegated to the same position they occupied before such Award was made."

The answer to this question is based upon principles of law, so elemental, that the citation of only a few of the authorities, which have directly passed upon the point, we believe to be sufficient. Section 3 (j) of the Railway Labor Act, 45 U.S.C.A. 153 (j) requires notice; *Nord* v. *Griffin*, 86 F. 2d. 481, 484 (7th Cir. 1936), certiorari denied in 300 U. S. 673, 81 L. Ed. 879; *Estes* v. *Union Terminal Co.*, 89 F. 2d. 768, 770, 771; *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 416; *The Railroad Yardmasters of North America, Inc.* v. *Chicago River & Indiana Railroad Co., et al.*, 70 F. Supp. 914, 916, 917. Affirmed, 166 F. 2d. 326; *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U.S. 711, 734, 736, 738; 89 L. Ed. 886, 90 L. Ed. 706; *Templeton* v. *The Atchison, Topeka & Santa Fe Railway Co., a corp., et al.*, No. 4234, 16 C.C.H. Labor Cases Par. 65069, U.S.D.C., W.D., Mo., W.D. (Mar. 30, 1949).

III.

The question of a jurisdictional dispute, determinable only by negotiation, mediation or arbitration as provided by the Railway Labor Act, was properly held by the Court of Appeals as not an issue before the court on the record.

The court of appeals rightfully held that the question of a jurisdictional dispute was not before the court on this appeal from the order granting the interlocutory injunction and the citation from the opinion of the court of appeals (R. 301-302), in the preceding paragraph of this argument, is applicable and need not be repeated. The cases cited in the preceding paragraph also show that all cases of this nature, which were ordinary suits in equity, held that such Awards by the Board, which were rendered in violation of the Railway Labor Act, Section 3 (j), were void. The most casual reading of the verified complaint will show that no question of a jurisdictional dispute is involved in this case. The petitioners having no defense to the questions properly raised on the record of this appeal from an order granting an interlocutory injunction, have interjected into this case matters which are not supported by the record and which have no bearing on the issue.

IV.

An issue in the trial court, as well as on the appeal, is whether the award of the board is void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found from the facts by the trial court.

The petitioners in the questions presented, reasons for allowance of writ and specification of errors, have assumed

propositions which are not an issue on this appeal from an order granting an interlocutory injunction. There is nothing appearing in the allegations of fact upon which to predicate the various assumptions by the petitioners which we will later attempt to analyze. There is nothing in the prayer for relief upon which the petitioners can reasonably base their assumptions. Paragraph I of the prayer for relief (R. 43), merely prays that the order and Award of April 20, 1942 be decreed null and void and set aside, and that the defendants (R. 44) be enjoined from enforcing the void Award against the rights of the plaintiffs. The prayer also is that an interlocutory injunction be issued during the pendency of the suit and that upon final hearing, the interlocutory injunction be made permanent. The verified complaint is predicated upon the case of *Nord* v. *Griffin*, 86 F. 2d. 481, in which a non-union employee was deprived of his position by an order of the National Railroad Adjustment Board, First Division, without notice and without an opportunity to appear and defend although said employee was a person involved in the controversy and that his rights had been adversely affected by said Award. The District Court found the Award void. *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722. This case was affirmed in *Nord* v. *Griffin*, 86 F. 2d. 481, and this court denied Certiorari in 300 U. S. 673. The sole question in said case was identical with the sole question in the case at bar. The Court of Appeals, in deciding the case of *Nord* v. *Griffin*, laid down the fundamental principles of law which had been promulgated by this Honorable Court and have been continuously followed as the law governing the question in the instant case.

The Circuit Court of Appeals in a unanimous opinion (p. 483) in the last cited case, states:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void

> enactments or adjudications is entitled to protection, in the absence of an adequate remedy at law. *Truax* v. *Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283. Obviously the District Court was correct in concluding that the Award deprived appellee of his property rights."

This well stated principle of law has become so firmly established in American jurisprudence that we do not believe there is any question of a doubt as to its soundness.

In discussing the jurisdiction of the District Court to protect the rights of citizens from the enforcement of void enactments, the court further states, that the Railway Labor Act did not in any way limit the jurisdiction of the District Court, and on page 484 states:

> "The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

This same doctrine of the jurisdiction of the District Court in matters of this kind is succinctly stated in *Lane* v. *Union Terminal Co.*, 12 F. Supp., 204, 205, where the court states:

> "Unlike the cases cited by the defendants Estes & Felton, Lane does not rest for the equity powers which he invokes on the Railway Labor Act of 1934. He enters a court of general jurisdiction as a citizen, asking for his constitutional rights, **not under the act nor by virtue of the act, but in spite of the act.**" (Emphasis ours.)

When we consider that the Railway Labor Act makes no provision for review of its proceedings and only permits a successful employee in whose favor an Award is made by the Board, or someone on his behalf, to apply to the District Court for the enforcement of the Award, any employee who has been deprived of his constitutional rights by an

Award of the Board, without notice as provided by the Railway Labor Act, Section 3 (j), would be without remedy.

In further considering the invalidity of the Award by the *Board in Nord* v. *Griffin*, 86 Fed. 2d 481, the court concisely states the nature of the proceeding in the instant case at page 484:

> "The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of the plaintiff are protected by the Fifth Amendment."

The court cites the case of *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 33 S. St. 1033, 1041, 57 L. Ed. 1427, where this Honorable Court states (*Nord* v. *Griffin*, 86 F. 2d. 481, 484):

> "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The Court of Appeals, *Nord* v. *Griffin*, 86 F 2d. 481, closes the opinion as follows (p. 484):

> "Clearly the Award, so far as appellee was concerned was in violation of his rights under the Fifth Amendment to the Constitution, and it was the court's duty, with jurisdiction of the subject-matter and of the parties, to award the injunction. The decree is affirmed."

The settled principles of law as stated by the Court of Appeals in its decision is so well grounded and so well known that even the layman understands that life, liberty or property cannot lawfully be taken from any person

within the jurisdiction of the United States, without "due process of law". In the case of *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 416, the court again restates the well known principles of law applicable to the instant case and follows the law as laid down in *Nord* v. *Griffin*, 86 F. 2d. 481 and uses language applicable to the identical question decided by the Circuit Court of Appeals in the case at bar and states (418):

> "No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether milestones in a controversy to which only a labor organization and a carrier are parties before the Board.
>
> **It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board, unless notice is waived.**" (Emphasis ours.)

In *Estes* v. *Union Terminal Co.*, 89 F. 2d. 768, the Court fully discussed the necessity of notice to be given employees involved, under the Railway Labor Act, Section 3 (j), which discussion is found on pages 770 and 771. For the sake of brevity we will not quote from the opinion as we believe such quotation is unnecessary.

The identical question decided in this case concerning the invalidity of an Award by the Board where no notice was given to the employees adversely affected, is found in the *Railroad Yardmasters of America, Inc.* v. *Chicago River and Indiana Railroad Co., et al.*, 70 F. Supp. 914, where the identical question was decided and discussed at pages 916 and 917. This case was affirmed, 166 F. 2d. 326.

In a very recent case, decided March 30, 1949, the identical question again was considered and the principles of law laid down by the Circuit Court of Appeals, in the instant case, was followed and fully discussed. See *Templeton* v. *The Atchison, Topeka & Santa Fe Railway Co., a corp., et al.,* No. 4234, 16 C.C.H. Labor Cases, Par. 65069, U.S.D.C., W.D. Mo., W.D. (Mar. 30, 1949).

It may be called to the Courts attention that the same attorneys who are now contending that the principle of law, followed by the Circuit Court of Appeals in the instant case is not applicable to the case at bar, cited and urged successfully in the *Railroad Yardmasters of North America, Inc.* v. *Chicago River and Indiana Railroad Co., et al.,* 70 F. Supp. 914, 916, 917 Affirmed 166 F. 2d. 326, a case identical as to the lack of notice to an employee involved, within the Railway Labor Act, Section 3 (j), as in the instant case, and now urge that this principle of law should not be sustained by this Court.

Although no special or important reasons have been shown by the petitioners for the granting of their petition for writ of Certiorari, we believe this Court has fully settled the question decided by the Court of Appeals in the instant case and that no need for a repetition is shown. In *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U. S. 711, 734, 736, 738; 89 L. Ed. 86, 90 L. Ed. 706, this Honorable Court rendered a decision which shows the importance of notice to the individual employee as required by the Railway Labor Act, Section 3 (j), and also the invalidity of any Award entered by the Board, without notice. The following language used by the court we believe to be applicable to the instant case and is conclusive that the Award in the instant case is void and that the issuance of the temporary injunction was proper; that the affirmance of the injunctional order by the Court of

Appeals was proper and in accordance with the well settled principles of law, this Court at page 734 states:

> "The proviso to Section 2 Fourth in terms reserves the right of 'an employee individually' to confer with management; and Section 3 First (j) not only requires the board to give 'due notice of all hearings to the employee * * * involved in any dispute submitted * * *, but provides for 'parties' to be heard either in person, by counsel or by other representatives, as they may respectively elect."

The court further states at pages 738:

> "* * * an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him."

Although this quotation appears to be quite extended, we felt it necessary to attempt to show the Court, that there are no special and important reasons for review on writ of Certiorari the well rendered opinion of the Court of Appeals in the instant case. We sincerely hope that we have shown to the Court that there has been no conflict in the decision of the Court of Appeals of the Seventh Circuit and any other Circuit on the same matter; that no important question of local law has been decided in the instant case in conflict with applicable local decisions; that the matters involved in the instant case have been long settled by this Court and need not be restated; that the decision in the instant case has not been decided in a way probably in conflict with the applicable decisions of this Court but in perfect harmony with a long unbroken line of decisions in

both Federal and State Courts, where the identical matters have been involved; that the Court of Appeals in the instant case has not departed from the accepted and usual course of judicial proceedings and has not sanctioned in a departure by the lower Court; that the questions involved on the appeal from the interlocutory injunctional order did not involve questions of peculiar gravity and general importance; that no public interest is involved in the decision and that the decision of the Court of Appeals was not in an extraordinary case but followed the usual procedure which has been well established governing the review of an interlocutory injunctional order. Rule 38, Rules and Regulations of Supreme Court of the United States, *Hamilton-Brown Show Co.* v. *Wolf Bros. & Co.*, 60 L. Ed. 629, 633, 634. It is respectfully urged that the petition for writ of Certiorari be denied.

V.

That the Brotherhood of Railroad Trainmen as representatives of the petitioners, who were sued as respresentatives of a class, was not an indispensable party, because having actual knowledge of the pendency of the suit, it could have made an application for intervention had it desired so to do.

The claim made by the petitioners that the Brotherhood of Railroad Trainmen is an indispensable party to the suit, is without merit and the statement that the Award of the Adjustment Board was in favor of the Brotherhood of Railroad Trainmen, is not supported by the record. (Plaintiffs' Exhibit "A" & A-2, R. 58-62.) The Circuit Court of Appeals held that if the Brotherhood of Railroad Trainmen wished to become a party to the suit they could have made an application for intervention, as F. W. Coyle, Vice-

President of the Brotherhood of Railroad Trainmen, was made a party defendant and that the Brotherhood had actual knowledge of the suit. It made no application for intervention although this court in *Order of Conductors* v. *Pitney*, 326 U. S. 561, 564, has recognized that although the Brotherhood is an unincorporated association, could intervene in any case that it could show it was an indispensable party. The Court of Appeals also cited, *Order of Conductors* v. *Swan*, 329 U. S. 520, 524, to support its opinion that the Brotherhood could have made application for intervention if it so desired. In addition to the Vice-President of the Brotherhood being made a party to the suit, a half dozen members of the Brotherhood were made parties to the suit, and all filed their defense and were represented by the same counsel, who now appear for them in this court. Surely this part of the Court of Appeals decision does not give ground for review by this Honorable Court, and the statement that the Award was in favor of the Brotherhood is not borne out by the record (R. 59). The Brotherhood of Railroad Trainmen was not an employee of the Santa Fe and did not claim that it had any grievances or disputes involving the Brotherhood. The finding of the Board upon the whole record states (R. 59):

> "The Carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934."

The Award gives nothing to the Brotherhood of Railroad Trainmen. The statement made by the petitioner that the Award was made in favor of the Brotherhood is without any support in the record (R. 22-25). This unsupported statement of the petitioners appears throughout the petition for the writ of Certiorari and we feel it would be an imposition to extend this brief by denying this statement each time it appears in the petition.

The only case cited by the petitioners in support of his contention is *Mallow* v. *Hinde,* 25 U. S. 116, at 119-120. In searching for this case we found it in 25 U. S. 193. The quotation from the case, although not applicable to the Brotherhood, is applicable to the plaintiffs because their rights were adjudicated upon without their being actually or constructively before the court. This doctrine is so well established and has been repeated so often by this court that no reason appears to review the instant case in which the same principle is involved and was adhered to by the Court of Appeals towit:

> "• • • No Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." (*Mallow* v. *Hinde,* 25 U. S. 193.)

The Court of Appeals did not hold that the Brotherhood was not an indispensable party but that it had a right to make application for intervention if it desired so to do (R. 306-307). When we consider that the issue in this case was limited to the proper discretion used by the trial court in granting the interlocutory injunction to preserve the status quo and the validity of the Award as against the plaintiffs who were employees involved, who were affected adversely by the Award, who received no notice as required by the Railway Labor Act, Section 3 (j) and who had no opportunity to appear and defend as provided for under the Railway Labor Act of proceedings in which they were denied the due process of law according to the Fifth Amendment of the Constitution, we submit that the decision of the Court of Appeals was in accordance with the well established procedure in such matters, and the petition for Certiorari should be denied.

VI.

The petition for a writ of certiorari should be denied because (1), the decree is not a final one and (2), none of the reasons as shown by Rule 38 of the United States Supreme Court or as set out in the decisions of this court appear in the record or from the decision of the United States Circuit Court of Appeals, sought to be reviewed.

This Honorable Court has held, the fact that the decree sought to be reviewed by Certiorari was not a final one, is alone sufficient grounds for the denial of the application, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 60 L. Ed. 629, 634, and further, the fact that the decree is important to the parties is of no concern to the Court, unless there is a question of public interest and general importance and where no conflict between the State and Federal Courts or between those of Federal Courts of different Circuits, appear to be involved, that there is no need for review of the decision of the Circuit Court of Appeals. The last cited case (pp. 633, 634) expressly states the grounds which should appear in the decision of the Circuit Court of Appeals in order that a review by Certiorari will be necessary. This Honorable Court has also set forth, in Rule 38 of Rules of the Supreme Court, certain grounds which should appear or at least some of them should appear from the decision to be reviewed. We submit that the decision in the instant case and the points involved fail to come within the purview of the grounds heretofore held by this Court to be necessary for the granting of an application for a writ of certiorari.

The instant case only involving an appeal from an interlocutory injunction and the affirmance of the order granting same, we submit that the rules of procedure have been so well announced and followed that it is not necessary to

reiterate the same. Although the petitioners have attempted to cause this Court to believe that the question of a collective bargaining agreement, a labor dispute and the provisions of the Norris-LaGuardia Act are involved, we submit that the record does not support the contentions of the petitioners, but on the contrary will disclose only the regular procedure, where an appeal has been taken from an interlocutory injunction order and affirmed by the Court of Appeals.

VII.

Petitioners have no cause to complain of the injunction bond as an interlocutory injunction bond is to be fixed in such sum as the Court deems proper.

Rule 65 (2) of the Rules of Civil Procedure following 28 U.S.C.A., Section 382, provides in substance that no temporary injunction, etc., shall issue "except upon the giving of security by the applicant, in such sum as the court deems proper" for the payment of such damages as may be sustained by any party who is found to have been wrongfully enjoined.

In giving security on the granting of an application for a temporary injunction, the rules provide that the amount of the bond shall be within the discretion of the court. This rule is clear and unambiguous. The court had considered the matter involved and used its discretion in making the original bond $1,000 (R. 82), which was approved by the court October 31, 1944 (R. 88). July 10, 1947, the petitioners made a motion to increase the bond to $130,000 (R. 126) which motion was denied. November 13, 1947, the petitioners made a motion to increase the bond to $150,000, the motion was denied January 21, 1948. On the granting of the temporary injunction from which this

appeal was taken the court fixed an additional bond in the sum of $1,000, January 28, 1948. Each motion of the petitioners to increase the bond and for an additional bond was fully heard by the court and the court used its discretion as provided for in Rule 65 (2) of the Rules of Civil Procedure.

There was no denial by the petitioners that the Award was entered without notice and without an opportunity to the plaintiffs to be heard as required by the Railway Labor Act, Section 3 (j), and the court having considered the decision in *Nord* v. *Griffin*, 86 F. 2d. 481, and other cases holding that such an Award was void as against the plaintiffs, had the right to fix the amount of the bond.

The petitioners are again in error when they attempt to quote the statement of the judge (p. 39, Petitioners' brief) in the following words:

> "He thought there was no merit in the defense (R. 200-B)."

A reference to the record shows that the court in fixing the additional $1,000 bond on the temporary injunction states (R. 200-B):

> "The Court: May I say, if I thought there was any merit at all to your theory, certainly I would increase the bond."

This conversation was between court and counsel, Jan. 28, 1948, after the court had been dealing with the case since 1944 and was thoroughly familiar with the issues involved.

We submit that the ruling of the court on the interlocutory injunction bond is not sufficient cause for this court to review the decision of the Circuit Court of Appeals.

ANALYSIS OF PETITION FOR WRIT OF CERTIORARI.

(Note: In view of the many statements made by the petitioners, which we believe are not supported by the record, we shall endeavor to briefly analyze the same which analysis we hope will assist the court in getting a full and correct picture of the case.)

Petitioners Statement of Matters Involved (2-8).

INTRODUCTION:

The petitioners state that this case presents a question whether injunctive process was properly used in a dispute involving porters and brakemen as to which of the two separate classes of railroad employees shall perform braking duties at the head end of the passenger trains of the Santa Fe. Such is not the issue on this appeal from an order granting an interlocutory injunction. The issues have been correctly stated in the brief of the plaintiffs and supported by the record in their "Summary of Argument", Points II, III, and IV, and fully discussed under the "Argument" contained in their brief, Points II, III, and IV. The petitioners seem to think that because the contract for services of the plaintiffs was not in writing, it had no validity and they were at liberty to illegally interfere with the relationship of employer and employee which had existed for more than 40 years continuously prior to the filing of the claim by the Brotherhood of Railroad Trainmen on behalf of the petitioners as a class, who are brakemen and members of the Brotherhood. This Honorable Court in the well rendered decision of *Truax* v. *Raich*, 239 U. S. 33, had long before settled the law concerning contracts at will, which principles of law are contrary to the theory of the petitioners. In the case in which the question was raised and decided, *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131, 134, the court at page 134 states:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." (Cases cited.)

This sound doctrine enunciated by this Court was followed in *Nord* v. *Griffin*, 86 F. 2d. 481, 483, and has been the law since promulgated by this Honorable Court more than 34 years ago. We have quoted from the above last cited case because throughout the brief of the petitioners they constantly speak of the employment of the plaintiffs as being "at will". In the brief of the petitioners (p. 2), they speak of certain disputed work being in issue in the case at bar. The relief prayed for is that the Award be declared void for the reasons heretofore given. No request is made for the District Court to settle any dispute, nor to interpret any collective bargaining contract or any other contract. The petitioners fail to mention that under the collective bargaining contract of 1926 between the Brotherhood and Santa Fe, mentioned by them (p. 2) in the Introduction, that the plaintiffs were not to be interfered with in their work which they had been performing since 1899 (p. 61), however, may we urge that these matters, or any other matters, may be pertinent on the merits of the instant case but they have no place on this appeal as heretofore

shown in the plaintiffs Summary of Argument and Argument.

History of Dispute (R. 2-3).

The petitioners pretend that the proceedings before the Board were simply for the collection of wages claimed to be due for brakemen from Amarillo, Texas, (R. 59), but we find that the Board in effect, not only found that the brakemen were entitled to certain wages, but extended their findings so as to displace the plaintiffs. This matter may also be considered on the merits of the case but as to these proceedings we respectfully claim they have no bearing on the case. The statement that no effort was made by the plaintiffs to intervene before the Board because they did not believe the Board had authority to hear them, is incorrect. The fact is that no notice was given to any of the plaintiffs as required by Section 3 (j) of the Railway Labor Act and this is the prayer of the complaint that the Award be set aside because the plaintiffs were adversely affected and had received no notice. What would have happened had notice been given the plaintiffs is not a question in this case and can only be decided when properly brought before the court.

Collective Bargaining Agreement of April 27, 1944 (R. 3-4).

Petitioners refer to an alleged contract of April 27, 1944, made two years after the void Award and solely for the purpose of carrying out the void Award as stated in the agreement itself (R. 154, 155, 210). If the contention of the petitioners concerning this contract has any merit, a consideration of the same at this time does not come within the issues involved on this appeal and may be urged on the final hearing on this cause when the merits are considered in the District Court. Paragraph 1 (A) of the

April 27, 1944 document (R. 154) was introduced solely on a hearing for temporary injunction to show that the void Award was being made effective. This was in connection with the testimony of Mr. Kirkpatrick, Vice President of the Santa Fe, who stated that this document, (plaintiffs Exhibit II, R. 154), was simply to comply with the void Award which is the subject of attack in this case (R. 155).

We are not making an issue of any contract or so called collective bargaining agreements for consideration in this cause as to their validity or invalidity as we believe such matters may be presented on the merits of the case but not in this proceeding.

The Injunction Suit (R. 4-5).

The petitioners assume that the document of April 27, 1944 is in some way an issue in this proceeding and that there is some dispute between the petitioners and the plaintiffs to be settled in the case pending in the District Court and on the appeal from an order granting the interlocutory injunction. Such is not the case and we regret that it has been necessary to repeat so often that the question of a labor dispute, collective bargaining or the Norris-LaGuardia Act is not involved in this ordinary suit in equity to set aside the void Award. The finding of fact and the conclusions of law fully set forth grounds upon which the interlocutory injunction was issued (R. 201-208). We must at all times keep in mind that this proceeding only involves an order granting an interlocutory injunction to preserve the status quo and the affirmance of that order by the Circuit Court of Appeals.

Hearing on Preliminary Injunction.

The hearing on the application for an interlocutory injunction did not involve the document of April 27, 1944 and the Court found that no notice was given to the plaintiffs as required by Section 3 (j) of the Railway Labor Act (R. 201) and further found that irreparable loss would be suffered by the plaintiffs (R. 206) unless the interlocutory injunction issued. The Court concluded that the facts in the case at bar and those appearing from the record in *Nord* v. *Griffin*, 86 F. 2d. 481. were identical and that the law applicable to both cases was the same (R. 206). The petitioners offered no sworn testimony of any kind to contradict the testimony offered by the plaintiffs.

Preliminary Injunction (6).

Petitioners again attempt to interject in this matter the document of April 27, 1944 which was not made any part of the complaint and no relief was prayed concerning the said document. The statement that the bond fixed by the Court in the sum of $1,000 was admittedly only a small fraction of the petitioners lost wages, does not say by whom it was admitted and the plaintiffs did not admit that the $1,000 bond was inadequate. The discretion placed in the Court to fix a bond was properly exercised. We have discussed the three or four attempts by the petitioners to increase the bond and have also shown that the statement alleged to have been made by the judge, that he saw no merit in the brakemen's defense, was an incorrect statement. The interlocutory injunction was issued by the court after a full hearing and was for the purpose of preserving the status quo.

The Decision on Appeal (P. 7-8).

The petitioners allege that the Court of Appeals considered a dispute was involved in the case at bar. A mere reading of the last paragraph of the opinion (R. 304) will show that the petitioners have overstated the Courts opinion, the only analogy in the *Randolph* case and the case at bar is that porters and brakemen were involved in both cases. The Court clarifies this matter in the same paragraph by stating (R. 304-305):

> "The instant case is distinguishable because it is an *attack only upon an Award* (Emphasis ours) which has been made. It is not sought to obtain a judicial ruling as to the rights of the parties to the disputed work and as already shown, the order appealed from does not pretend to make such an adjudication. The rights of the parties under the order invalidating the Award are neither determined nor changed. They remain just as they were before the Award was made."

The petitioners also state that it was conceded that the performance of the document of April 27, 1944 was prohibited by the injunction. Plaintiffs have made no such concession as the interlocutory injunction which speaks for itself made no mention of any document of April 27, 1944 (R. 207, 208). Again we urge that the document of April 27, 1944 is outside the scope of the matters to be considered at this time by the Court and may be presented on the merits, if found pertinent.

Application for Rehearing (8).

The application for rehearing by the petitioners was based upon matters which were not considered within the scope of the appeal from the interlocutory injunction and concerned matters outside of the scope of the Court's juris-

diction in considering an appeal from an interlocutory injunction. The principles of law to be considered on such an appeal and the procedure as laid down by this Honorable Court is clearly stated in *Alabama* v. *U. S.*, 279 U. S. 229, 230.

Statement as to Jurisdiction (9-10).

1. The plaintiffs believe that they have fully covered the law showing that the petition for a writ of Certiorari should not be granted in this case (see Summary of Argument and Argument of plaintiffs), and we will content ourselves in stating that the cases cited by the petitioners, (p. 9) *Land* v. *Dollar*, 330 U. S. 731, 735 and *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 377, fail to express the propositions of law for which they are cited.

Questions Presented (11-13).

We submit that the first question as to whether the Brotherhood of Railroad Trainmen is an indispensable party defendant in this suit has been fully answered (See plaintiffs Argument and Summary of Argument), and we will only state that this suit was not to enjoin performance of a labor contract nor to nullify an Award rendered in favor of the union in a labor dispute.

2. This suit is not brought to settle any labor dispute and such question is not presented by the record, nor to construe any contracts.

3. The Norris-La Guardia Act is not applicable to the instant case as this suit in equity does not involve a labor dispute and does not pray for the settlement of any labor dispute.

4. This suit does not involve the power of the National Railroad Adjustment Board to exercise its authority of

interpretation and application of a collective bargaining agreement and there was no admission by the plaintiffs that they had no right to intervene in the Board's proceeding which involved their rights and whose decision adversely affected their property rights. The question was the validity of a proceeding which resulted in an Award by the Board, which deprived the plaintiffs of their property rights without due process of law and in violation of the Fifth Amendment of the Constitution, said Award being entered without notice and without affording them a right to defend, as provided by Section 3 (j) of the Railway Labor Act.

5. There is no question of the irregularity as to notice by the National Railroad Adjustment Board as required by the Railway Labor Act, Section 3 (j), but a total failure of the Board to give any notice to the employees, to be adversely affected by the proceedings resulting in the Award. The petition for rehearing not having been disposed of until May, 1944, and no enforcement of the void Award having been started until after the withdrawal of the petition for rehearing, a suit filed in August, 1944, to prevent the enforcement of the said void Award was not an unreasonable delay in filing suit, as the Award would only become effective after the petition for rehearing had been withdrawn (R. 131). It is respectfully urged that the question of laches in bringing suit by the plaintiffs may be presented when the merits are considered, if pertinent, but is not to be considered in this proceeding.

6. This is not a suit brought by a group of employees seeking to secure for themselves certain work, but only a suit in equity to set aside a void Award and to enjoin its enforcement against the plaintiffs who had received no notice of the proceeding and Award as required by the Railway Labor Act, Section 3 (j). The interlocutory in-

junction does not prohibit the enforcement of any labor agreement.

7. The fixing of an interlocutory injunction bond is left to the discretion of the Court and it is not admitted by the plaintiffs that the bond in the instant case is insufficient. There is no merit to the contention that the Court fixed the bond in the instant case, merely because the Court believed that the defense of the petitioners was not meritorious although the question concerning the fixing of the bond has been fully covered in the plaintiffs Summary of Argument and Argument No. VII.

Reasons for Allowance of Writ (14-17).

1. The Court of Appeals did not hold in the instant case that the performance of a Railroad labor union's collective bargaining contract with the railroad may be enjoined. The Award was not in favor of the union but of the individual brakemen.

2. The Court of Appeals did not hold in the instant case that a group of railroad employees claiming the same work as that covered by collective bargaining contract between the railroad and competing groups of employees may maintain an injunction to secure the disputed work. The *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d. 4, was a suit filed to settle a labor dispute and does not conflict with *Nord* v. *Griffin,* 86 F. 2d. 481, or any of the cases cited under point IV of the Argument of the plaintiffs.

3. There was no admission in the record that the plaintiffs were not entitled to intervene in the instant case and no question of any labor dispute was involved in the appeal from the order granting the interlocutory injunction.

4. There was no question of an alleged irregularity as to the service of notice as required by the Railway Labor

Act, Section 3, (j), as there was a total failure to attempt to serve any notice or comply with said Section of said Act. There was no review of the Board's proceedings on the merits and two years had not elapsed after the Award became effective. This question was not material to the issue involved on the appeal to the Circuit Court of Appeals. No new method for judicial review of an Adjustment Board proceedings was decided as shown by the opinion.

5. The Court of Appeals has not sanctioned the granting of an interlocutory injunction to enjoin the performance of a labor contract, as this was a suit in equity to set aside a void Award. Such suits may be brought to set aside any void Awards, judgments or decrees when the persons adversely affected were deprived of their property rights without notice and without an opportunity to be heard in such proceeding. This is elemental. There was no admission that the bond accepted by the court on the interlocutory injunction was insufficient and the court did not abuse its discretion in fixing the amount of the bonds at $1,000 each.

The Reasons For The Allowance Of The Writ do not show sufficient grounds for the allowance of the writ of certiorari as the record and evidence show that the purported reasons given by the petitioners are incorrect and not supported by the pleadings and proceedings in the District Court and the Court of Appeals.

Specification of Errors (19-21).

1. The Award was not entered in favor of the Brotherhood of Railroad Trainmen as stated by the petitioners in this specification of errors and this matter is fully covered in Point V of the Summary of Argument by the plaintiffs

and the Argument. The question of a collective bargaining agreement is not an issue in this case.

2. This suit is not to secure for the plaintiffs any work covered by a collective bargaining contract as such question is not in issue on this appeal and the question of a collective bargaining agreement and the Norris-LaGuardia Act are not involved in this suit.

3. In the instant case from the pleadings and the evidence introduced on the hearing for the interlocutory injunction, it appears that the question involved was the failure of the National Railroad Adjustment Board or anyone else to give notice to the plaintiffs of the proceedings before the Board, which resulted in an Award which deprived them of their property without due process of law as heretofore and herein stated. There was no showing before the Trial Court that the plaintiffs had received any notice as required by Section 3 (j) of the Railway Labor Act, or that the plaintiffs had any actual knowledge of the proceedings although the law requires a proper notice.

4. The Court of Appeals did not hold that the Award of the Adjustment Board was being reviewed in the case at bar, but that the Award was void because of a failure of the Board to comply with Section 3 (j) of the Railway Labor Act.

5. The question of the collective bargaining agreement was not before the District Court on the motion for an interlocutory injunction and was not an issue on the appeal to the Circuit Court of Appeals and no finding of fact or conclusions of law were necessary to be made in the District Court on a matter not material to the issues involved.

6. There was no error in the District Court using its discretion in fixing the amount of the appeal bond as Rule

65 (2) of the Rules of Civil Procedure for the District Court of the United States was fully complied with.

Summary of Argument and Argument (22-40).

I. THE BROTHERHOOD AS AN INDISPENSABLE PARTY.

We have heretofore called to this Honorable Court's attention that the statement made by the petitioners that the Award was made in favor of the Brotherhood of Railroad Trainmen is incorrect and the entire argument based upon the above summary is upon this erroneous theory, and further upon the erroneous theory that a collective bargaining agreement is sought to be enjoined in the instant case. The record is not referred to by the petitioner, to show that the Award was in favor of the Brotherhood and the Award itself does not so state. The record fails to show that a collective bargaining agreement of any kind is involved in this suit in equity and when the petitioner states "this suit complains primarily against a labor contract", the statement is incorrect and not supported by the record (p. 25, Argument of Petitioner). When the petitioner alleged that "the Court of Appeals has held that the Award in the Brotherhood's favor was void," this also is an incorrect statement as there is no Award appearing of record made in favor of the Brotherhood (p. 22, Petitioners Summary of Argument). When the petitioner states (Argument, p. 25), "the injunction as issued runs against the Brotherhood as representative of the Santa Fe brakemen", this is an incorrect statement of the facts which are not supported by the record (R. 207-208).

The Court of Appeals did not decide that the Brotherhood was not an indispensable party, but stated that if the Brotherhood desired to intervene, it had a perfect right to make such an application (R. 307), that F. W. Coyle, the

Vice-President of the Brotherhood was a party defendant and the Brotherhood had actual notice of the suit but made no effort to intervene (R. 306-307). Six members of the Brotherhood were party defendants to the suit and all of these defendants filed a joint answer but did not deny that notice had not been given to the plaintiffs as required by the Railway Labor Act, Section 3 (j). The record shows that the Brotherhood represents all of the brakemen as their agent and certainly having the principals as defendants whose rights would be affected if the Award is set aside, there was no need to make the agent a party to the suit. The agent was not an inhabitant of this district and could not be sued here as recently held by the court in *Brotherhood of Locomotive Firemen and Enginemen* v. *LeRoy Graham,* U.S.C.A., D.C. No. 9716 decided October 26, 1948, which opinion superseded the opinion of September 20, 1948. The case was on special appeal from the United States District Court, District of Columbia. (See C.C.H. 15, Labor Cases No. 74303, p. 6472.)

We do not believe it necessary to further extend this analysis as to Point I of the Summary of Argument (p. 22) and Argument (25-27) as we believe this matter has been fully covered in the Argument of the petitioner's Point V. We do not believe this principle of law contended for by the petitioners is of special interest and importance so as to grant the petiiton for writ of certiorari, and we respectfully urge that the same be denied.

II. Applicability of Railway Labor Act and Norris-LaGuardia Act.

The petitioners cite *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d. 4 (8th Cir. 1947) as being in conflict with *Nord* v. *Griffin,* 86 F. 2d. 481, (C. C. A. 7). A mere reading of the first page of the *Randolph* case will show

that the question involved in the case at bar and the question involved in the *Randolph* case are not the same. The court begins its opinion in the *Randolph* case (p. 5) by stating, that the two labor unions through their union officials as plaintiffs, "invoked the jurisdiction of the court to preserve to them by injunction the performance of certain enumerated items of passenger trains operating work on the lines of the two railroads". In the case at bar, no such relief is asked or prayed for and the only relief asked and prayed for in the instant case is that the order of the National Railroad Adjustment Board which was entered without notice to or opportunity for the plaintiffs to appear and defend, be set aside because the proceedings and Award adversely affected the property rights of the plaintiffs by depriving them of their property without due process of law as held in *Nord* v. *Griffin,* 86 F. 2d 481, and further that they were employees involved within the meaning of the Railway Labor Act, Section 3 (j).

This matter is fully covered in plaintiff's brief, Point IV thereof and we believe extended argument is unnecessary. On this appeal from the order granting this interlocutory injunction, the Norris-LaGuardia Act is not applicable and no jurisdictional dispute is involved. The law as stated in *Nord* v. *Griffin,* 86 F. 2d. 481, has been followed by each case in which this matter has arisen and which are cited under said Point IV of plaintiff's Argument. In petitioner's Argument (p. 28), it is again asserted that the interlocutory injunction prohibited the performance of a document of April 27, 1944, which was entered into for the purpose of carrying out the void Award entered more than two years before this document was executed. The interlocutory injunction shows on its face that no mention was made of this document (R. 207-208) and the force and effect of this document may be considered on the merits

of the case, but is not in issue in this proceeding, which is only an appeal from an order granting an interlocutory injunction.

The petitioners in their Argument (p. 29), cite Order of *Railway Conductors* v. *Pitney*, 326 U. S. 561, as supporting their proposition of conflict but a mere reading of the case will show that it applies to railway labor disputes and not to suits in equity to set aside void enactments which deprive employees of their property rights without notice as required by Section 3 (j) of the Railway Labor Act.

There is nothing in the verified complaint, the prayer for relief or the findings of fact and conclusions of law of the District Court which support the charge by the petitioners that the decision of the Court of Appeals stands for court intervention in jurisdictional railway labor disputes, or that collective bargaining agreements made in accordance with the Railway Labor Act may be disregarded. This matter has been fully discussed in the Argument of the Plaintiffs, Points II, III and IV, and extended argument, we do not believe, should be further made.

III. Knowledge and Notice of the Adjustment Board Proceeding.

The petitioners state that the plaintiffs, having actual knowledge of the Adjustment Board proceedings under attack, and having made no attempt to intervene, should not be heard to complain that they did not receive formal notice (p. 23). This statement is unsupported by any evidence in the record and is made for the purpose of attempting to bring this suit within the case of *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 327 U. S. 661, 666, 667, but the facts in the *Burley* case and the cause of action are entirely different from the case at bar. A mere reading of the case (p. 662) will show that the court states:

"We adhere to our decision rendered in the opinion filed after the first argument." 325 U. S. 711.

In which case *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U. S. 711 and cited by the plaintiffs under Point IV of their Argument, it will be noted that this Honorable Court (p. 738) states that an award entered without notice from the Board as required by the Railway Labor Act, Section 3 (j), cannot be effective as against the aggrieved employee, unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him under Section 3 First (j). In further referring to Section 3 First (j) of the Railway Labor Act, this Honorable Court on p. 734 states:

> "These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard 'in person'. Nor would the **provision for notice 'to the employee** * * * involved in any dispute' be either appropriate or necessary. **If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose.**" (Emphasis ours.)

The petitioners attempted to substitute their bare statement of actual knowledge when the law requires the Board to give notice to employees involved, we do not believe such will receive the sanction of this Honorable Court. The petitioners cite, *Order of Railroad Telegraphers, et al.* v. *New Orleans, Texas, and Mexico Ry. Co., et al.*, 156 F. 2d, 1, (C. C. A. 8) (p. 32). This case did not involve the invalidity of an Award made by the Board without notice and without an oportunity to be heard by the employees against whom the Award was rendered although involved in the matter as required by Section 3 (j), Railway Labor Act. This was an action for declaratory judgment and in-

junctive relief by one union and its officers against another union and its officers to determine a jurisdictional dispute and after hearing on the merits, the petition was dismissed (p. 2). The court states (p. 2):

> "the controversy concerns the proper interpretation and application of collective bargaining contracts of the two unions to the positions and work program by the Telegrapher's craft on the one hand, and the clerk's craft on the other. The avowed purpose of the action is to protect the alleged individual contract rights of individual telegraphers employed at the stations on the lines of the defendants."

In the case at bar, there is no such jurisdictional dispute involved and the case is not applicable to the facts alleged in the verified complaint in the instant case, nor the relief prayed for and therefore does not conflict with *Nord* v. *Griffin*, 86 F. 2d. 481, which is directly in point.. However, the matters raised by the petitioner is not an issue on this appeal. 'Tis true that the court in its opinion stated that certain employees had no right to intervene before the Adjustment Board but that point is not involved in this case and will be met when and if such situation arises before the Adjustment Board in the event the judgment of the Circuit Court of Appeals is allowed to stand by a denial of the petition for the writ of certiorari. The petitioners allege (p. 33) that the plaintiffs acknowledged, at least inferentially, that they had no right to notice of the proceedings before the Board. No such acknowledgment was made and Congress would not have provided for notice to be given by the Board to employees involved unless said employees would have some right to appear and defend. The effort made by the petitioners to distinguish the case of *Nord* v. *Griffin*, 86 F. 2d. 481, fails to show that the instant case is not identical and that the point involved in the instant case was not involved in the *Nord* v. *Griffin*, 86 F. 2d. 481 (p. 33).

We believe that this matter has been sufficiently discussed in the Argument of the plaintiffs and that no questions of public interest or importance are involved in the opinion of the court of Appeals and that certiorari should be denied.

IV. The Circuit Court's Review of the Adjustment Board Award on Its Merits.

The Circuit Court of Appeals did not review, on the merits, the Adjustment Board's interpretation of the contract made on behalf of the petitioners, between the Santa Fe and the petitioners. The statement that the review on the merits was made by the Court of Appeals is not supported by the opinion. It has been repeated several times in this brief of the plaintiffs that this suit in equity is not brought under the Railway Labor Act, but is an ordinary suit in equity to set aside a void decree and as heretofore stated in *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204, 205, that the plaintiffs do not rest for the equity powers which they invoke in this suit on the Railway Labor Act, but they enter the Court of general jurisdiction in federal equity matters, as citizens, asking for their constitutional Rights, *Not Under the Act Nor by Virtue of the Act, But in Spite of the Act.*

An impartial reading of the verified complaint, and the prayer for relief, contained therein will clearly show that no review was sought on the merits of the Board's Award in the trial court or on the appeal and only the validity of the Award is attached as stated in *Nord* v. *Griffin*, 86 F. 2d. 481, 484. The Court of Appeals decided the matter properly before it in accordance with the long established principles governing such appeals.

It is true that the petitioners continuously interjected

in the trial court and in the Court of Appeals matters which were not material to the issue and as will be noticed the petitioners have quoted in their brief, matters which are outside of the record and the court may have made remarks during the Argument or in the Opinion solely with the attempt to inform the petitioners that such matters were not proper to be considered in appeals of this kind.

There is no need to assume that the Court of Appeals reviewed on the merits the Award of the Board. The two-years limitation for a successful Appellee to apply to the District Court for the enforcement of an Award in his favor does not limit the general powers of the District Court in dealing with void enactments. We have argued the fact that no attempt was made by the Railway Labor Act to prevent a court of equity from setting aside a void Award and in such suit, only the invalidity of the Award will be the issue to be decided in a case of this kind (See plaintiff's Argument, Point IV). In answering the many propositions urged by the petitioners we do not wish to be understood as condoning the fact that these issues are proper for consideration on an appeal from an order granting an interlocutory injunction and it is only to let the court understand that we did not pass these matters up unanswered.

We respectfully urge that the application of the petition for writ of Certiorari be denied as no questions of public interest or general importance were involved in this appeal and we do not believe the pertinent issues involved in an appeal of this kind, bring the instant case within Rule 38, Rules of the Supreme Court of the United States, and as stated by this Honorable Court in *Hamilton-Brown Shoe Co.* v. *Wolf and Co.*, 60 L. Ed. 629, 633, 634, in addition to the fact that this is not a final decree and many of the

issues raised by the petitioners, if pertinent, may be considered on the hearing of the merits.

V. Absence of Findings or Conclusions Regarding April 27, 1944 Contract.

We do not believe there is any merit to the contention that Rule 52 (a) of Rules of Civil Procedure has been disregarded in this proceeding (p. 24 Summary of Argument by petitioners, and Argument pp. 36-38). We urge that the findings of fact and conclusions of law fully comply with Rule 52 (a) (R. 201-207) and petitioners complaint that additional findings concerning the document of April 27, 1944, were not made by the District Court is without merit.

The pertinent parts of Rule 52 (a) now provides:

> "• • • In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."

This rule was formerly Equity Rule 70½ and has been construed for many years. We believe the findings of fact (201-207) fully meet the requirements of the Rule.

The petitioners must have overlooked an important part of the Rule which states:

> "• • • findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The petitioners failed to offer any witnesses for the hearing on the interlocutory injunction. The plaintiffs did offer witnesses which were heard by the court and whose testimony was not contradicted.

The petitioners cite *Mayo* v. *Lakeland Highlands Canning Company*, 309 U. S. 310, at 316, in support of Point V. of their Argument (pp. 36-38). We find no quarrel

with this statement of the law by Mr. Justice Roberts and adhere to his statement of the law on the review of an order granting an interlocutory injunction (p. 316) where he holds that the issues on review should be limited in particular to a showing, that pending final hearing and enforcement of a statute or law, irreparable damages would be inflicted upon the complainants. We believe this applies to the enforcement of a void Award such as appears in this case and it was not proper for the trial court to try all matters urged by the petitioners on the hearing for an interlocutory injunction. We submit that the trial court made sufficient and proper findings of fact and conclusions of law which appear in the record and that the same are supported by the evidence appearing in the record which was offered on the hearing for the application. Nothing appears on this point to warrant a review of the decision of the Court of Appeals on Certiorari.

VI. Deliberate Inadequacy of the Injunction Bond.

Under point VII of the Argument by the plaintiffs, we believe this matter has been fully argued and that repetition is unnecessary.

The case cited by the petitioners, *International L. Garment Work. Union* v. *Donnelly G. Co.*, 147 F. 2d. 246, in support of their contention, we do not believe applicable to the case at bar. An affidavit of Oral B. Mullen, General Chairman of the Brotherhood of Railroad Trainmen for the Santa Fe, was filed (R. 144-145) by the petitioners attempting to show that the Santa Fe brakemen were losing wages at a rate exceeding $900 per day. He does not say how many thousands of brakemen he has referred to. He does not say that the brakemen referred to by him are not performing their regular work as brakemen and receiving regular pay from the Santa Fe. He attempts to discuss the document of

April 27, 1944 and to interpret the same directly contrary to the provisions of the said document (R. 144, 145). He states that certain brakemen received $700,000 from the Santa Fe without performing any work for the same (R. 145). It is to be remembered that this document of April 27, 1944 was entered into two years after the void Award was rendered. His affidavit does not deny any of the allegations in the verified complaint and affidavits in support thereof, or the testimony of Mr. McFarland, Secretary of the Adjustment Board or Mr. Kirkpatrick, Vice-President of the Santa Fe.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition of C. D. Shepherd, *et al.*, petitioners, for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 10, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 705

C. D. SHEPHERD, ET AL.,
Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,
Respondents.

BRIEF OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, DEFENDANT-RESPONDENT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO THE BRIEF SUPPORTING SAID PETITION.

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May 9, 1949.

THE DUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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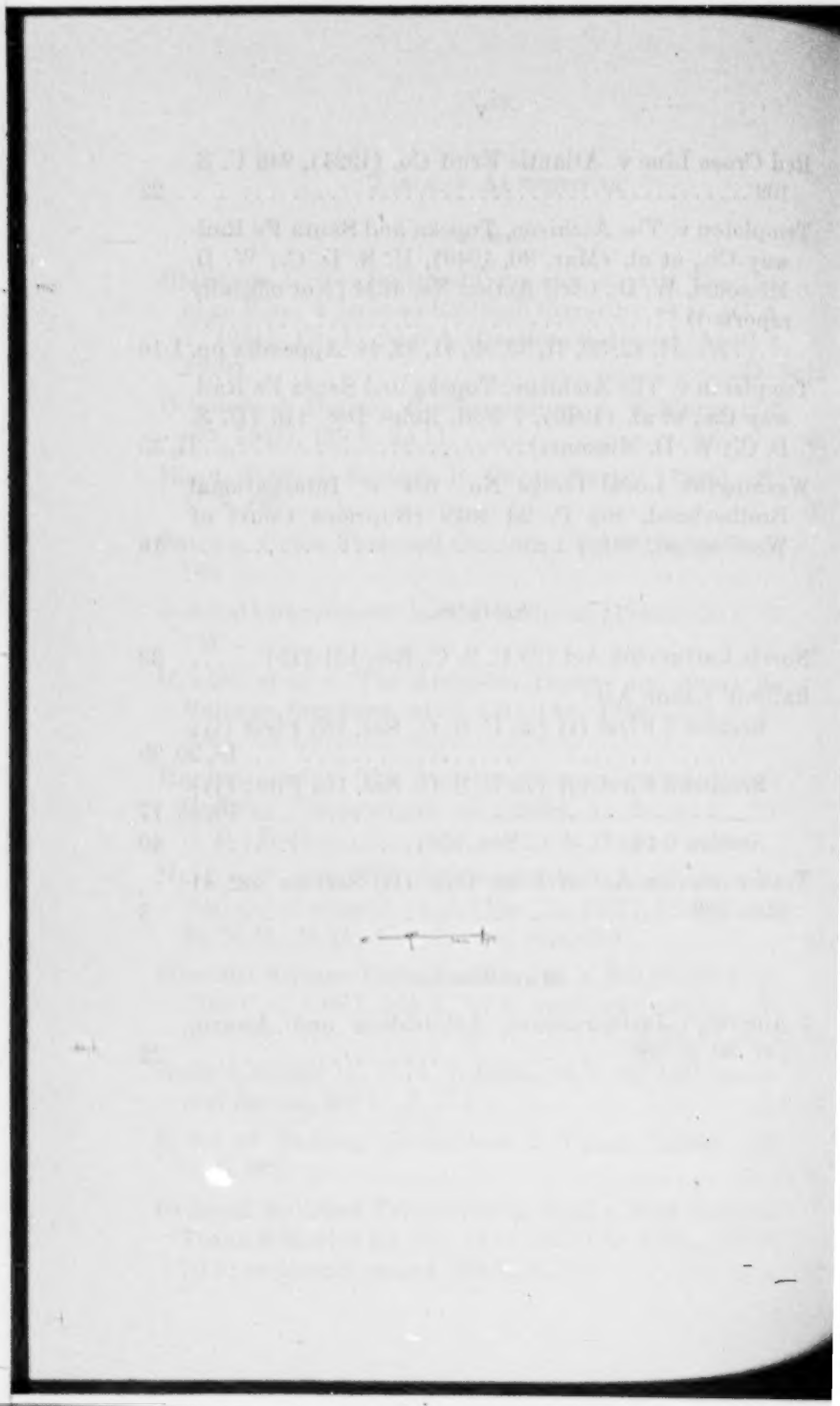

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To the Honorable Fred A. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

It is believed that a more complete and accurate statement of the case than is afforded by petitioners' statement will be of assistance to the Court.

The decision of the United States Court of Appeals for the Seventh Circuit, December 14, 1948, is reported in 171 F. 2d 594 as *Obie Fauster Hunter, et al.* v. *The Atchi-*

son, Topeka and Santa Fe Railway Company; C. D. Shepherd; et al. It affirmed the order of February 6, 1948 of the United States District Court for the Northern District of Illinois, Eastern Division, granting a temporary injunction, which is reported in 78 F. Supp. 984, with the District Court's findings of fact and conclusions of law. The judgment of the United States Court of Appeals became final by the denial of a petition for rehearing on January 14, 1949. (R. 345)

Obie Fauster Hunter, *et al.*, respondents herein, were the plaintiffs in the United States District Court for the Northern District of Illinois, Eastern Division, in a suit in equity in which they asked the court to enjoin The Atchison, Topeka and Santa Fe Railway Company, defendant-respondent, and C. D. Shepherd, *et al.*, petitioners, from enforcement of Award 6640 of the National Railroad Adjustment Board, First Division, which was rendered April 20, 1942. (Whenever the term "Adjustment Board" is used in this brief, it means the First Division of the National Railroad Adjustment Board.) The complaint alleged that the said plaintiffs-respondents (who hereinafter will be called plaintiffs) were parties involved in the dispute before the Adjustment Board but had no notice of the hearing. The United States District Court granted a temporary injunction. (R. 201-208) C. D. Shepherd, *et al.*, petitioners herein, appealed to the United States Court of Appeals for the Seventh Circuit. In their petition here they say that they are of the craft of employees known as brakemen (page 1) and we shall hereinafter refer to them as "the brakemen".

Award 6640 of the First Division, National Railroad Adjustment Board (R. 219-248), which plaintiffs and this defendant-respondent contend is void, originated in a protest filed with that Board, on behalf of four named brakemen in Texas, by the Brotherhood of Railroad Trainmen

(hereinafter called BRT), the duly designated representative of the class or craft of brakemen employed by The Atchison, Topeka and Santa Fe Railway Company, defendant-respondent (hereinafter called Santa Fe). (R. 219) The protest which led to Award 6640 was another step in furtherance of efforts begun by BRT in 1920. (R. 237)

Decisions of Previous Adjustment Boards.

In 1925, formal protest was made by BRT to an adjustment board, established pursuant to Title III, Section 302, Transportation Act of 1920, 41 Stat. 469, known as Train Service Board of Adjustment for the Western Region. (R. 240) The basic issue was the same as in the claim which BRT filed before the National Railroad Adjustment Board in 1939, resulting in Award 6640, which plaintiffs say is void. The BRT had agreed in writing that it would accept the decision of the Train Service Board as final and binding on the parties to the dispute. (R. 240)

On September 9, 1926, the Train Service Board ruled against BRT in Decision 2126 (R. 239, 247) and held that there was no rule in the agreement between BRT and Santa Fe which supported the claim. After that, BRT negotiated a schedule agreement with Santa Fe, effective December 1, 1926. (R. 247) Again, BRT presented the same basic issue to the same Train Service Board; and that Board, having before it Article XXIX (R. 248), again denied the claim in Decision 2336, dated February 8, 1927. (R. 240, 247)

Article XXIX of BRT Schedule.

Article XXIX, as it stands in the schedule today, is in the same language which it contained in 1926. (R. 241) It reads as follows:

> "The term 'Trainman' or 'Trainmen', as used in this agreement, is understood to mean freight and passenger Brakemen, and Baggagemen, with the further understanding that this definition does not change, alter or extend present application of these rules to baggagemen or train porters."

Santa Fe has employed colored train porters since before 1900. (R. 235) Up to the time this suit was filed, the train porters had no collective bargaining representative and no agreement was ever entered into between Santa Fe and the train porters as a class. (R. 115) The collective agreement between Santa Fe and its brakemen provided in Article XXIX, quoted in the preceding paragraph, that the positions held and the duties performed by train porters do not come within the scope or purview of the schedule of rates, rules, and regulations for trainmen. (R. 241-242)

Craft or Class of Train Porters.

The train porters are a separate class or craft from brakemen. (R. 12-13) The work which they perform is at the head-end of passenger trains. (R. 12, 137) Since they were first employed, the train porters have always been required, along with their other work, to perform the following duties: (a) Inspect cars and test signals and brake apparatus for the safety of train movement; (b) use hand and lamp signals for the protection and movement of trains; (c) open and close switches; (d) couple and uncouple cars and engines and the hose and chain attachments thereof; and (e) compare watches when required by the rules of the company. (R. 11, 75, 235)

Both Santa Fe (R. 74, 76) and plaintiffs (R. 26, 34) admit that the employment of plaintiffs was at the will of Santa Fe. The members of plaintiffs' class or craft were carried on Santa Fe seniority rosters—one for train porters and one for chair car attendants. (R. 76)

Proceedings Before the National Railroad Adjustment Board, First Division.

In the proceedings before the Adjustment Board, Santa Fe presented the facts as herein stated (R. 235-245) and asked the Board to deny the claim made by BRT. (R. 245) In its findings (R. 246), the Adjustment Board declared that the parties were given notice of the hearing. The parties were Brotherhood of Railroad Trainmen and The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines. (R. 219) The Secretary of the Adjustment Board testified that he gave no notice to any one other than those two parties. (R. 185)

The Adjustment Board sustained the claim and found that "The use of porters or other employees who do not hold seniority as brakemen is in violation of claimants' seniority rights" (R. 246), but made no interpretation of Article XXIX of the BRT schedule wherein BRT agreed that the work performed by train porters did not come within the scope of trainmen's work. (R. 246)

Dissent to Award 6640.

In the dissent filed by the five carrier members of the First Division of the Adjustment Board, the point just mentioned was stressed and the additional point was urged that BRT, prior to making the agreement which contained Article XXIX, had bound itself by written agreement, as representative of the brakemen (trainmen), to abide by the decision of the Train Service Board of Adjustment, which in 1926 and 1927, by two separate decisions, denied that brakemen were entitled to perform the work which, since 1900, had belonged to the separate class or craft known as train porters. (R. 246-248)

Santa Fe's Petition for Rehearing of Award 6640.

On May 14, 1942, Santa Fe filed a petition for rehearing (R. 132) and on June 3, 1942 filed an amended petition. (R. 132-133) The Board never granted or denied the petition, its record showing that there was a tie vote, although the Secretary testified that only two of the five labor members participated (R. 197) and that no actual vote was taken which could result in a tie vote. (R. 198) The Secretary of the Board testified that no action would have been taken on the petition for rehearing. (R. 198-199)

Santa Fe's Agreement to Implement and Enforce the Award.

Beginning prior to January 18, 1944, BRT was insisting that Santa Fe put Award 6640 into effect without further delay. (R. 159, 167) Santa Fe informed plaintiffs' attorney of this fact on January 18, 1944. (R. 158) The award had not become final under the statute (R. 131) and the petition for rehearing was still pending when an agreement was signed between Santa Fe and BRT, April 27, 1944 (R. 154, 198, 210) to put the award into effect (R. 155); on May 3, 1944, Santa Fe withdrew its petition for rehearing of the award. (R. 133-134)

Except for the District Court's restraining order, Santa Fe would have complied with the April 27, 1944 agreement to implement and enforce the award (R. 155, 163) and that meant that the train porters would have been displaced by brakemen. (R. 164)

No evidence was offered by the brakemen to deny that BRT subjected Santa Fe to strong insistence to put the award into effect. (R. 167, 200) There is no evidence in the record that the April 27, 1944 agreement was in

pursuance of any notice prescribed by the Railway Labor Act; it states on its face (R. 210) that it is in compliance with Award 6640, which award the plaintiffs (R. 35) and Santa Fe (R. 78) and the Secretary of the Adjustment Board (R. 185) say was rendered without notice of hearing having been given to the plaintiffs.

The Award Declared Void.

The District Court found that no notice of the hearing was given to plaintiffs who were involved in the subject matter thereof, that the proceedings before the Adjustment Board were conducted outside their presence, that they were not represented or heard before the Board; that the brakemen, through the BRT, were continuing to insist that Santa Fe comply with the award; that Santa Fe's petition for rehearing was withdrawn because of the insistence of BRT, acting for the brakemen; and that the imminent displacing of the plaintiffs would be solely due to such award. (R. 205-206) On these grounds and relying on *Nord* v. *Griffin*, 86 F. 2d 481 (1936, CCA 7), certiorari denied in 300 U. S. 673, the District Court concluded that the award was void and that the employment rights of the plaintiffs had been interfered with through the enforcement of void Award 6640; it issued a temporary injunction February 6, 1948. (R. 206, 207)

The Decision On Appeal.

The brakemen appealed from the injunction order to the Court of Appeals for the Seventh Circuit, in which court the Santa Fe urged the affirmance of the injunction and opposed the contentions of the brakemen as it had done in the District Court and before the Adjustment Board (R. 233-245) and as it had opposed the BRT contentions

in the cases before the Train Service Board of Adjustment for the Western Region. (R. 240, 247) The Court of Appeals affirmed unanimously. (R. 308) It held that the Adjustment Board did not exercise its statutory authority to interpret and apply the contract between BRT and Santa Fe as it existed, but instead made a new and different contract between BRT (the brakemen's representative) and the carrier. (R. 306) It declared Award 6640 void because the Board exceeded its authority, and also because the award was made without notice of hearing (R. 306) to the plaintiffs as required by the Railway Labor Act.

The Court of Appeals held that the instant case is clearly distinguishable from the case of *Missouri-Kansas-Texas R. Co., et al.* v. *Randolph, et al.* (Eighth Cir. 1947), 164 F. 2d 4 (R. 304), in that the case before the Seventh Circuit did not seek "to obtain a judicial ruling as to the rights of the parties to the disputed work and, as already shown, the order appealed from does not pretend to make such an adjudication." (R. 305) The Seventh Circuit further held that "The rights of the parties under the order invalidating the award are neither determined nor changed. They remain just as they were before the award was made." (R. 305)

Application for Rehearing.

The brakemen applied for a rehearing December 28, 1948. (R. 309-318) Santa Fe filed its answer on January 7, 1949, asking the court to deny the rehearing. (R. 321-332) The Court of Appeals denied rehearing on January 14, 1949. (R. 345)

SUMMARY OF ARGUMENT.

I.

Notice Under the Railway Labor Act.

The Railway Labor Act commands that employees involved in a dispute before the National Railroad Adjustment Board shall be given due notice of a hearing. The Secretary of the Adjustment Board testified in the case that he gave no notice to the plaintiffs. The Court of Appeals followed the law, therefore, when it declared Award 6640 void. That award vitally affected the plaintiffs adversely and it was rendered without giving them notice of the hearing and without their participation therein. The proceeding before the Adjustment Board, on its face, related merely to wage claims of four brakemen, employed in Texas; yet the Board, without any notice to plaintiffs, rendered an award which swept out of existence this whole class of Santa Fe employees.

II.

The Adjustment Board Exceeded Its Statutory Power.

The Adjustment Board is a creature of Congress and has only the limited power which the Railway Labor Act gave it. The authority to interpret does not include the arbitrary power to make new contracts for the parties. Santa Fe never promised BRT that the trainmen whom it represents should have the right to perform the head-end work on passenger trains, which plaintiffs have performed for 50 years. The agreement between Santa Fe and BRT plainly does not extend to that work. The Court of Appeals exhaustively analyzed all the evidence and held the

award void on two grounds: lack of notice to the plaintiffs, and an exceeding of its authority by the Adjustment Board. Even a court is not empowered by law to make a new contract for parties who ask the court to construe an existing contract.

III.

An Agreement in Advance, To Be Bound by an Arbitration Award Will Be Upheld.

When persons agree in advance that they will abide by the result of an award issued by an Arbitration Board to which they submit a dispute, they will be held to that agreement. The record of this case includes the whole proceedings before the Adjustment Board and when the record is examined it cannot be doubted that BRT made such an agreement in the cases presented to the Train Service Board of Adjustment of the Western Region in 1926 and 1927. The agreement made by BRT was binding on the class of brakemen, and the petitioners in this case are brakemen. The BRT, therefore, had no right even to bring the dispute to the National Railroad Adjustment Board. If it wanted a different contract with Santa Fe, the Railway Labor Act provided a course which it could have adopted.

IV.

BRT's Vice-President Was a Party Defendant But BRT Chose Not to Intervene.

The brakemen petitioners and the Vice-President of their Organization were parties defendant in the case below. The decision of the Court of Appeals shows that BRT had actual knowledge of the case. The brakemen filed an affidavit in the case executed by their General Chairman. In another case which was before the Court of Appeals on

the same docket as this case, BRT was represented by the same attorneys who represent the brakemen here. In the other case BRT intervened. It could have done so in this case, which was pending from August 21, 1944 until 1948, before the temporary injunction was issued.

V.

There Is No Conflict Between the Seventh and Eighth Circuits.

The Court of Appeals understood the difference between a jurisdictional controversy and a simple suit in equity to protect rights which otherwise would be lost. No judicial ruling was sought in this case as to the rights of the respective parties to perform certain work, and the order which was appealed to the Seventh Circuit did not pretend to make such an adjudication. The cases relied on by the brakemen relate to outright controversies between railroad labor unions whose work-jurisdiction overlaps. Nothing like that is presented here.

The March 30, 1949 decision of the United States District Court for the Western District of Missouri, Western District, in the Eighth Circuit, in the case of *Templeton* v. *AT&SF Ry. Co.; Brotherhood of Railroad Trainmen, et al.* (not yet officially reported) is included in this brief as an Appendix. The case before the District Court of the Eighth Circuit dealt with the five awards of the Adjustment Board which immediately preceded Award 6640 and with the identical memorandum agreement of April 27, 1944, given to implement and enforce the award, before this Court. It held the awards void, and its findings of fact and conclusions of law are unmistakably in harmony with the Seventh Circuit. Each Court holds that an award of the Adjustment Board is void where notice is not given to parties involved in the dispute; each Court holds that when the

Board undertakes by means of an award to make a new agreement, such conduct is void; each Court holds that the effect of its decision is to place the parties back where they were before the award was rendered, free to pursue any remedies they have under the Railway Labor Act.

VI.

(a) Actual Knowledge of the Hearing Before the Adjustment Board.

(b) Continuation of the Jurisdictional-Dispute Argument.

(a) After a week of taking depositions in Texas, New Mexico, and Missouri, seeking for evidence that the plaintiffs or any of them had knowledge of the hearing, no such evidence was found. The sum total of the depositions was described by the Seventh Circuit as meager evidence that plaintiffs became aware of the award when it was too late to be heard. A statutory requirement concerning notice cannot be satisfied by vague and scanty knowledge of something after the fact.

(b) (Since the brakemen resumed their jurisdictional-dispute argument at pages 31 to 34 of their petition, under the heading of "Actual Knowledge," we find it necessary to follow their procedure so as to obtain continuity of arrangement.)

The essential difference in the authorities relied on by the brakemen, as compared with the law applicable to the case before this Court, is that we have no conflicting or overlapping collective agreements here. There is no dispute between collective bargaining agents here, and it affirmatively appears that judicial intervention was necessary to protect the rights of the plaintiffs.

In the Templeton decision, shown in full in the Appendix of this brief, the District Court of the Eighth Circuit ex-

tended the full power of equity to hold certain Adjustment Board awards void, but refused in the same case to rule on Santa Fe's cross-claim for a declaratory judgment. This case graphically illustrates that the Eighth Circuit is in complete harmony with the Seventh Circuit in the matter of jurisdictional disputes and justiciable controversies.

VII.

The Court of Appeals Did Not Review Adjustment Board Award 6640.

The Court of Appeals decided that the injunction was properly issued, and it held that Adjustment Board Award 6640 was void for several reasons. It found and declared that the Board ignored the BRT contract, and that the Board boldly wrote out of the existing contract the provision by which BRT had agreed with Santa Fe that train porters would keep on performing the head-end work on passenger trains, as they had done for fifty years.

The Adjustment Board had nothing before it to interpret and it did not even pretend to interpret the contract. It rewrote a contract for BRT and Santa Fe by usurping a power not conferred on it by statute. That is what the Court of Appeals said and that is what the Court meant. To say that the Court of Appeals reviewed the Adjustment Board's interpretation is to refuse to acknowledge the facts which BRT has known since 1926 when it made the agreement.

VIII.

Absence of Findings or Conclusions Regarding April 27, 1944, Contract.

An examination of the trial Court's lengthy findings of fact and conclusions of law should be sufficient, without argument, to establish the proposition that the decision before this Court is amply supported. The brakemen made a full and complete argument in their petition for rehearing; they insistently urged the Court of Appeals to make a definite statement about the April 27, 1944 memorandum agreement which had beeen executed to implement and comply with void Award 6640. The brakemen told the Court of Appeals that in the absence of such findings someone might believe that the Court meant to strike down the April 27, 1944 agreement as well as the void award. Santa Fe argued this out in its answer to the petition for rehearing and maintained that the agreement was no better than the void award. When the Court of Appeals denied the petition for rehearing, therefore, no doubt could remain regarding the intention of that Court.

IX.

Adequacy of Injunction Bond.

The action of the trial judge in refusing to grant the brakemen's motion to increase the amount of the injunction bond in this case was no different from what has been done in other cases of this character in which this Court refused to grant certiorari.

ARGUMENT.

INTRODUCTION.

The United States Court of Appeals Decided All Questions Before It in Accordance With the Requirement of the Railway Labor Act and the Established Law.

The brakemen assign six reasons for allowance of the writ (pages 14-17) and make six specifications of error. (pages 19-21). These are merely repetitions of what they argued in the United States District Court and then in the Court of Appeals for the Seventh Circuit and what they presented to that court on their petition for rehearing. (R. 309-318)

A brief review of the record will convince this Court that the essential question for decision was whether plaintiffs had a right, under Paragraph 3, First (j), to be given due notice of the hearing before the Adjustment Board and whether the complete denial of that right entitles them to the protection of a court of equity. (R. 302) The companion question decided was whether the Adjustment Board exceeded its statutory authority when, in effect, it made "a new and different contract between the brakemen and the carrier." (R. 306) The Court of Appeals correctly decided the issues before it. All questions presented by the brakemen's petition are unsubstantial. We shall first present a direct and affirmative argument to the real issues in the case. Then we shall reply in opposition to each specification of error which the brakemen have presented.

I.

Where a Statute Requires Notice To Be Given, It Is the General Rule of Law That Actual Personal Notice Is Required.

The Railway Labor Act provides in 45 U. S. C. 153, First (j), that:

> "The several Divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The case of *Nord* v. *Griffin*, 86 F. 2d 481 (1936, CCA 7), certiorari denied 300 U. S. 673, is the great landmark of legal decisions in support of the proposition that persons involved in disputes submitted to the Adjustment Board must receive the benefit which Section 3, First (j) of the Railway Labor Act conferred upon them. In that case the plaintiff contended and the court found that he was directly interested in the controversy before the Board; that his right to seniority was a contract right of which he had been deprived by an award, in a proceeding to which he was not a party and of which he had no notice. The District Court concluded that under such conditions the award was in violation of plaintiffs' rights under the constitution, and it issued an injunction. In affirming the judgment of the District Court, the Seventh Circuit Court of Appeals said:

> "The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment." (page 484)

The Fifth Circuit Court of Appeals, in commenting on Section 3, First (j) of the Railway Labor Act, in *Estes* v. *Union Terminal Co.*, 89 F. 2d 768, (1937) said:

> "Section 3 is rendered somewhat ambiguous by the use of the word 'involved' instead of a more comprehensive term. But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. * * *
>
> "Notice may be brought to the attention of large groups of interested parties by posting it in appropriate places, the same as is usually done when an injunction is issued against a large class of persons. The difficulty of giving notice, or rather the inconvenience occasioned to the Board by doing so, would not excuse compliance with the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board, unless notice is waived." (pp. 770-771)

In the case before this court no attempt was made by any one to give notice to the plaintiffs. The Secretary of the Board admitted that the only parties notified of the hearing in the dispute submitted to the Board in Award 6640 were BRT and Santa Fe. (R. 185) From the record it appears without dispute that no notice of the pendency of the proceedings or of the hearing was given to the plaintiffs, and that they had no knowledge of the hearing.

In the quotation from the *Estes* case mention is made of informing large groups of interested parties by posting notices at appropriate places. There is no evidence in the record that any one made an attempt to notify the plain-

tiffs concerning the hearing which related only to the claims of four brakemen employed in Texas but which finally resulted in an award which attempted to sweep out of existence the whole class of Santa Fe employees represented by plaintiffs.

The case of *Washington Local Lodge No. 104* v. *International Brotherhood,* 203 P. 2d 1019 (Supreme Court of Washington, 1949) is peculiarly appropriate for consideration on this issue because it dealt with the relations between a local union and its international parent. At page 1061 of its unanimous opinion, the Supreme Court of Washington declared that it is within the powers of the courts—and indeed it is their duty—to protect the property rights of the members of labor union organizations when they are threatened or endangered without an opportunity to be heard. On this basis, that court reversed the decree of the lower court and remanded the case with instructions to enter a decree enjoining the International Brotherhood "from suspending or expelling any individual members of Local 104 as members, without notice given, charges and the opportunity to be heard." (page 1061) Thus we see that courts of equity afford to a labor organization the protection which in this case the labor organization denies to others.

II.

When Congress Authorized the National Railroad Adjustment Board, Under Section 3, First (i) of the Railway Labor Act, to Interpret Agreements Between a Carrier and Its Employees, It Did Not Confer Power On the Adjustment Board to Ignore the Agreement and to Make a New and Different Contract Between the Parties.

As argued by plaintiffs and by Santa Fe, Article XXIX of the collective agreement effective December 1, 1926, be-

tween BRT and Santa Fe, expressly excluded the work which plaintiffs had been performing for many years. The Court of Appeals found that the language of Article XXIX leaves no room for doubt that the collective agreement was not to extend to such work. (R. 306) In other words, Santa Fe never promised BRT the right to perform the head-on work on passenger trains. The article in the schedule which establishes this proposition was set out in the sworn complaint filed by the plaintiffs (R. 22, 38) and again in the brakemen's Exhibit 2. (R. 241) There was nothing for the Adjustment Board to interpret, in view of the clear and convincing language of Article XXIX.

As found by the Court of Appeals, the Adjustment Board, instead of exercising its statutory authority, merely wrote a new provision by means of which it arrived at the conclusion stated in Award 6640, which has now been declared void. The brakemen had every opportunity to produce oral and written evidence, since August 21, 1944, but did not put a single witness on the stand. They put in such evidence as they desired, but were satisfied merely to file an affidavit of their General Chairman, dated January 23, 1948 (R. 144), which related to the amount of the injunction bond fixed by the trial court. It can not be doubted that the trial court was impressed by the failure of the brakemen to produce any evidence on the vital points of the case. Ever since February 8, 1927, when the Train Service Board of Adjustment for the Western Region, in its Decision 2336, denied the BRT claim, based on the same collective agreement effective December 1, 1926, the BRT has known that Article XXIX of that agreement did not give the brakemen the right to do the work which plaintiffs perform at the head-end of passenger trains on the Santa Fe. (R. 247-248)

The Court of Appeals, after an exhaustive analysis of the issues in the case, not only held Award 6640 void because

the Board exceeded its authority and also because the award was made without notice to the plaintiffs as required by the Railway Labor Act, by reason of which their constitutional right to a hearing was denied, but the Court vindicated what the five members of the Board who dissented from the award stated in their dissenting opinion:

> "The lesson of the award is that contracts may be altered, changed, or amended, in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement. That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us." (R. 306)

The power of the Adjustment Board is specifically limited by Section 153(i) to the interpretation or application of agreements. It is given no authority whatever to change existing agreements or to make contracts for the parties or to write seniority provisions into a contract. This is a power which has never been conferred even upon any court. The action of the Board, therefore, in deleting part of Article XXIX from the contract, was without statutory sanction and consequently Award 6640 is void.

III.

Parties Who Agree in Advance That a Dispute Submitted by Them to an Arbitration Board Will Be Final and Binding Will Be Held to Such an Agreement, in Law or Equity, Upon the Rendering of an Award.

The BRT bound itself by written agreement, as to which no one has ever contended that it was not freely and voluntarily made, to accept as final and binding the decisions of the Train Service Board of Adjustment for the Western Region. (R. 240) Two disputes were submitted to the

Train Service Board by BRT, which resulted in Decision No. 2126 in 1926 and Decision No. 2336 in 1927, involving the same issues as were contained in Award 6640 decided by the Adjustment Board in 1942. (R. 246-248) In both decisions the Train Service Board ruled against BRT.

In its first decision, the Train Service Board found that the past practice under which everybody concerned had operated—the brakemen, Santa Fe, and the train porters—and the absence of a rule in BRT's collective agreement, required a denial of the claim. (R. 247) BRT immediately acted to overcome the difficulty of "the absence of a schedule rule" (R. 241, 247) which was the foundation of the Train Service Board's September 9, 1926 decision, and, effective December 1, 1926, it negotiated a schedule rule with Santa Fe, known as Article XXIX. Having done so, it resubmitted the issue a second time to the Train Service Board which again denied the BRT claim. (Decision 2336, dated February 8, 1927; R. 247)

BRT was bound to accept this decision as final and binding. This being the situation, BRT had no right to present a claim to the Adjustment Board covering the issues comprised by Award 6640. Because of the valid agreement to accept the Train Service Board decisions as final and binding, it can not be said that there existed any legal dispute between BRT and Santa Fe after those decisions were made. Since the whole issue had been determined in the decisions of 1926 and 1927, no dispute could arise for the determination of the Adjustment Board; and, therefore, the claim submitted to it in 1939, which resulted in Award 6640 in 1942, was not a genuine controversy.

When a person makes an agreement to arbitrate a dispute and stipulates that he will accept the decision as final and binding, and subsequent to that the arbitrator decides the dispute, it is the universal rule that the person making such an agreement can not escape its binding effect. The

law on this point is stated in 3 Am. Jur., Arbitration and Award, par. 30, p. 856:

> "If nothing in the terms of an arbitration agreement contravenes public policy in other respects, it is the universal rule that however comprehensive it may be, the mere fact that it provides for arbitration of disputes which may arise in the future will not, when once it has been executed,—that is, fully carried out by the parties and a final, certain, complete, and honest award made by the arbitrators upon all matters submitted, pursuant to the terms of the submission,—be ground for holding it invalid; it will then effectually bind the parties."

The leading case is *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, (1924) which clearly explains the law as follows:

> "* * * an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity." (p. 121)

The Court of Appeals took full cognizance of the fact that, notwithstanding the two decisions which the Train Service Board of Adjustment for the Western Region had rendered against BRT—one of them before and the other after Article XXIX was placed in the December 1, 1926 collective agreement between BRT and Santa Fe—that Organization filed another claim before the National Railroad Adjustment Board, in complete disregard of its having entered into a written agreement that the decision by the Train Service Board would be final and binding on it. (R. 305)

The opinion of the Court of Appeals, by unanswerable logic, shows that BRT made an agreement with Santa Fe that it would abide the result of the Train Service Board

of Adjustment cases decided in 1926 and 1927. (R. 305) BRT, therefore, bargained away its right to bring this case before the National Railroad Adjustment Board. (R. 305) Not only that, but, by the express terms of the 1926 agreement which BRT made with Santa Fe, it again bargained away any right to make a claim such as it presented in the proceedings which resulted in Award 6640, now declared void. (R. 306)

Santa Fe will now proceed to make direct reply in opposition to each question and specification of error presented by the brakemen.

IV.

The Vice-President of the Brotherhood of Railroad Trainmen Was Served as a Defendant in the Case Below, and the Court of Appeals Has Found That the Brotherhood Had Actual Notice of the Suit.

(In Reply to pages 25-27 of Brakemen's Petition.)

Adjustment Board Award 6640 was rendered on a claim which BRT brought against Santa Fe on behalf of certain brakemen. Plaintiffs sued the petitioners in this case, as representative of the class or craft of employees known as brakemen (page 1); plaintiffs also made F. W. Coyle, Vice-President of the BRT, a party defendant. The Court of Appeals has found that the BRT had actual notice of the suit. (R. 307) It further found that BRT made no application for intervention, which it could have done had it been desirous of being heard.

The case of *Baltimore & Ohio Railroad Company, et al.* v. *The Chicago River & Indiana Railroad Company, et al.* (C. A. 7, 1948), 170 F. 2d 654 (certiorari denied April 4, 1949) was argued before the United States Court of Ap-

peals, Seventh Circuit, and decided by that court during the same term in which the case which is now before this Court was argued and decided. In the *Baltimore and Ohio* case, the BRT knew about the case and intervened. BRT was represented in that case by the same attorneys who are petitioning for a writ of certiorari in this case. In both cases BRT had actual knowledge. In the one case it voluntarily intervened. In the case before this Court, the petitioners are brakemen and are, therefore, represented on the Santa Fe by BRT; during the hearing before the United States District Court, the brakemen placed in evidence an affidavit of General Chairman Oral B. Mullen, dated January 23, 1948. (R. 144, 179-180) The affiant described himself as "General Chairman of the Brotherhood of Railroad Trainmen, Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines." (R. 144) The BRT therefore participated in this case to that extent, and as it saw fit; but it made no formal effort to intervene in the case since August 21, 1944, the date when the complaint was filed in the District Court of the United States, Northern District of Illinois, Eastern Division. (R. 2)

Santa Fe believes that this Court will be no more disposed to permit litigants to play fast and loose with it than the United States Court of Appeals for the Seventh Circuit was willing to do. The opinion of the Seventh Circuit clearly shows that the order appealed from takes nothing away from the brakemen to which they were rightfully entitled. (R. 306)

At pages 26 to 27 of their petition for certiorari, the brakemen say that the decision of the Court of Appeals has the effect of denying the efficacy of railroad labor union conduct in submitting disputes for adjustment under the Railway Labor Act and in bargaining collectively to settle them. This is the same as saying that BRT, which acted

as representative of the brakemen before the Adjustment Board, is exempt from the requirements of the Railway Labor Act, and that it can have the benefit of a void award and of an agreement made to implement and enforce a void award.

There can be no question that, in the case before this Court, BRT knew about the proceedings at all stages of the litigation. Its Vice-President was a party defendant in the case below and its General Chairman participated in the case by filing the affidavit in respect to a point which the brakemen now urge in their petition as a reason for allowance of the writ (page 16) and as a specification of error (page 21).

The underlying question of the right to be notified of a hearing, for which plaintiffs and Santa Fe have been contending throughout this litigation, was satisfied as to BRT; and in support of this proposition the Court of Appeals not only cited the *Baltimore and Ohio* case, in which BRT had chosen to intervene, but it referred to cases decided by this Court in which other railroad labor organizations have intervened.

We submit that under all the facts and circumstances this issue has been correctly determined by the Court of Appeals.

V.

There Is No Conflict Between the Seventh and Eighth Circuits. There Is Complete Agreement Between the Decisions of Those Two Circuits. No Jurisdictional Dispute Exists in This Case. This Is a Simple Equity Suit in Which the Denial of Statutory Rights Belonging to Plaintiffs Has Been Enjoined.

(In Reply to pages 27-29 of Brakemen's Petition.)

The brakemen assert that there is a conflict between the Seventh and Eighth Circuits. They rely on the case of *Missouri-Kansas-Texas R. Co. et al.* v. *Randolph* (8th Cir. 1947), 164 F. 2d 4; certiorari denied in 334 U. S. 818. They say that the factual situations in the two cases are identical, except that in the case before this Court the matters in issue had been referred to the Adjustment Board; whereas, in the *M-K-T* v. *Randolph* case, decided by the Eighth Circuit, that had not been done. This is the equivalent of saying that two cases are exactly alike except for the fact that they are different. The Court of Appeals for the Seventh Circuit had no difficulty in determining that there is only the most superficial similarity between the cases. (R. 302, 304) It pointed out that in the *M-K-T* v. *Randolph* case relief was sought in court without first employing the Adjustment Board procedure under the provisions of the Railway Labor Act. In the case before this Court, however, we are dealing with a matter that *had been* referred to the Board. This suit attacked the award which the Adjustment Board rendered in disobedience of the explicit command of the Railway Labor Act to give due notice to parties involved in the dispute. In this case the Adjustment Board also went beyond its authority to interpret the collective agreement between BRT and Santa Fe and made a new agreement by ignoring

the substance of the one before it. (R. 304) These elements do not obtain in the *M-K-T* v. *Randolph* case.

The Seventh Circuit emphasized the fact that the case before this Court is completely different from *M-K-T* v. *Randolph*, because in the latter case it was sought to obtain a judicial ruling as to the rights of the parties to perform certain work; whereas, in the case before this Court "The order appealed from does not pretend to make such adjudication." (R. 305)

The Eighth Circuit merely said that the plaintiffs in the *M-K-T* v. *Randolph* case should not have submitted their dispute to the courts in the first instance but should have resorted to the Adjustment Board. The case before this Court is one in equity, wherein the plaintiffs have been granted an injunction against the consequences of an Adjustment Board award already rendered. Where else, except to an equity court, should they have gone for relief from the wrong and from what would confront them now, except for the intervention of the District Court's injunction? Unlike the situation in the *M-K-T* v. *Randolph* case, the present dispute did go to the Adjustment Board first. But when it was taken there it was so handled as to deprive parties involved in the dispute from being heard. From a reading of the whole opinion in the *M-K-T* v. *Randolph* case it is clear that the court means that the whole dispute must first go to the Adjustment Board rather than to a court. It does not mean that certain parties can take a case to the Board in a manner contrary to the Railway Labor Act and thereafter be beyond the reach of equity where they can enjoy the fruits of an award so obtained.

The courts would indeed be innocent and without practical knowledge or experience if they were willing to accept the theory of the brakemen, as stated at page 28 of their petition, that Award 6640 was merely a decision as

to a few isolated wage claims and that it did not amount to an order requiring that Santa Fe give the head-end work on passenger trains to brakemen—that is, to those holding seniority on the brakemen's roster of the Santa Fe. This, of course, would mean those individuals in the class represented on the Santa Fe by BRT.

The entire history of awards—whether rendered by the Adjustment Board, or by arbitration boards, or by fact-finding agencies—is contrary to such an idea. Could any one reasonably believe that if back wage claims are sustained against an employer, and thereafter he makes no change in the handling which resulted in such claims, there would be an end to the matter? Would not wage claims continue to accumulate and payment be demanded on the basis of the award? Does any one doubt that the various brotherhoods have been alert and insistent to require that carriers change their practices to conform with Board awards, even going so far in many instances as to threaten the ultimate in economic pressure to obtain that result?

The additional argument which the brakemen make at page 28 of their petition, regarding the April 27, 1944 memorandum agreement, is that it was the memorandum and not the award which had the effect of taking the head-end work away from the train porters and giving it to the brakemen. They say that the injunction had no effect on the award but, instead, has prohibited performance of the April 27, 1944 memorandum agreement.

They presented all this in oral argument before the Seventh Circuit. This is shown at the bottom of page 28 of their petition before this Court where they quote Judge Major's question. They omit the answer to that question which was to the effect that the agreement would fall with the award. The answer will be found in the brakemen's petition for rehearing. (R. 313) Santa Fe

joined issue on each occasion, in the oral argument and in its answer to the brakemen's petition for rehearing. (R. 329-331)

On page 29, the brakemen complain that the Seventh Circuit has not "seen fit to mention the April 27, 1944 agreement in its opinion." Again, this is what they complained of in their petition for rehearing. And all this was brought into full focus by Santa Fe's answer to their petition for rehearing, which we respectfully request this Court to examine. (R. 329-331)

Under these facts and circumstances, it must, therefore, be accepted that when the Court of Appeals denied their petition for rehearing, January 14, 1949 (R. 345) it did so with full understanding of the entire issue as presented by the brakemen. It considered the whole matter; it intended to, and did, dispose of it effectively. If this were not so, the Seventh Circuit would have granted a rehearing.

Certainly, the District Court did not intend to issue a meaningless injunction. According to BRT's petition for rehearing, the injunction of the District Court, which the Seventh Circuit has affirmed, would do no more than prevent Santa Fe from complying with Award 6640, and at the same time it would permit Santa Fe to carry out the April 27, 1944 memorandum which was entered into for the purpose of complying with the void award. In short, if we follow the reasoning of BRT's petition for rehearing, the injunction would fail to accomplish what the court intended to do. On the one hand, it would command Santa Fe to leave plaintiffs on their jobs; and, on the other hand, it would give approval to Santa Fe's removing the plaintiffs from those same jobs.

The suggestion contained in BRT's argument would make the decision a masterpiece of futility. The place of equity in American law would indeed be weak and pitiful if such a contradictory result were to prevail.

The analysis of the *M-K-T* v. *Randolph* case which the Seventh Circuit made is so clear and convincing (R. 304-305) that additional argument is almost superfluous for the purpose of refuting the claim made by the brakemen that a jurisdictional dispute is involved in both cases. The supposed conflict between the decisions of the Courts of Appeal for the Seventh and Eighth Circuits is imaginary. The real situation is that the Seventh and Eighth Circuits are in complete harmony. We refer to the case of *Templeton* v. *The Atchison, Topeka and Santa Fe Railway Company; Panhandle and Santa Fe Railway Company; and Brotherhood of Railway Trainmen* (hereinafter called the *Templeton* case), decided March 30, 1949, by the United States District Court for the Western District of Missouri, Western Division, Case No. 4234, not yet officially reported—a case practically identical with the one now before this Court. The findings of fact and conclusions of law in the *Templeton* case are included as an Appendix to this brief. On April 20, 1949, an injunction decree was entered in accordance with paragraph 10 of Judge Ridge's conclusions of law. (Appendix, pp. 15-16)

An examination of the *Templeton* case will disclose at once that the precise questions which were before the Court of Appeals for the Seventh Circuit were decided by the United States District Court of the Eighth Circuit and that the latter court is completely in accord, instead of in conflict, with the Seventh Circuit. Five awards of the National Railroad Adjustment Board were involved in the *Templeton* case; namely, Awards 6635 to 6639, inclusive. In each of these awards the claim was brought by BRT. The awards were issued the same day as Award 6640, now before this Court; namely, April 20, 1942. (R. 299; Appendix p. 8)

In the *Templeton* case, as in the case now before this Court, there was the same memorandum agreement dated

April 27, 1944, between F. W. Coyle, Vice-President of BRT and S. C. Kirkpatrick, representative of the Santa Fe. (R. 210-216; Appendix p. 9) The plaintiffs in the case before this Court were given no notice of the pendency of the proceedings before the Adjustment Board, and in like manner the plaintiffs in the *Templeton* case were deprived of any such notice. (R. 302; Appendix pp. 7, 8, 13)

In the case before this Court, Award 6640 of the Adjustment Board was declared void by the Seventh Circuit for lack of notice to parties involved in the dispute and also on the ground that the Adjustment Board exceeded its authority and in reality wrote a new contract between BRT and Santa Fe. (R. 306)

In the *Templeton* case, Awards 6635 to 6639, inclusive, of the Adjustment Board were declared void by the District Court of Missouri for the same reasons. (Appendix pp. 13-15) In the case before this Court, the Seventh Circuit declared that "the parties and the carrier are again free to attempt to settle the dispute by collective bargaining or an appropriate proceeding under the Railway Labor Act." (R. 302) In the *Templeton* case, the District Court of the Eighth Circuit said: "The parties are not restrained and enjoined from pursuing any remedies they may have under the Railway Labor Act." (Appendix p. 16)

The only important distinction between the decision in the case before this Court and the one in the *Templeton* case is that the District Court of the Eighth Circuit went farther and explicitly declared void the April 27, 1944 agreement which was executed by Santa Fe and BRT, for the purpose of complying with Awards 6636 to 6639 (Appendix pp. 14, 16); whereas, the Seventh Circuit, in the case now before this Court did so impliedly, instead of expressly, with respect to the identical agreement which included compliance with Award 6640. (R. 210)

Santa Fe, therefore, submits to this Honorable Court that there is no conflict of decisions between the Seventh and Eighth Circuits, and that consequently the basic ground urged by the brakemen petitioners for the granting of a writ of certiorari does not exist.

At page 29 of their petition, the brakemen say that both the *M-K-T* v. *Randolph* case and the case now before this Court purport to follow *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946) and that the decision in the *Pitney* case shows the need to resolve the conflict here. We have already demonstrated that no conflict exists, and we shall now prove that the *Pitney* decision was rightly applied in both cases.

In the *Pitney* case the Court was dealing with two questions: (1) the control which it should exercise over trustees appointed under the Bankruptcy Act; and (2) a jurisdictional dispute between different labor organizations. The railroad had entered into collective bargaining contracts with both ORC and BRT, which were claimed to be conflicting and overlapping. Suit was brought by ORC without any of the parties having first gone either to the Adjustment Board or Mediation Board. The Court found that each of the collective bargaining agreements had to be considered in the light of the other, together with the evidence as to usage, practice, and custom, and that the factual question was intricate and technical. It, therefore, held that the matter should first be referred to the agency especially competent and specifically designated by Congress to deal with such matters. However, in so holding, the Court said (page 567) that the statutory agency should have the first opportunity to pass on the issue, and that the extraordinary relief of an injunction should be withheld until it had done so. "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute."

In our case we have no jurisdictional dispute. There are no conflicting agreements between the railroad and different labor organizations. There is only one contract involved—that between the railroad and BRT. There are no intricate and technical questions of fact. Furthermore, the matter *has been* referred to the Adjustment Board and the Adjustment Board has acted wrongfully; and it now plainly appears that relief by way of judicial action was necessary to insure compliance with the Railway Labor Act. Therefore, the *Pitney* case supports the position of the plaintiffs and is against the brakemen in the case now before this Court. That the *Pitney* case did not deprive the court of jurisdiction is conclusively shown by the statement on page 566:

> "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene."

It is plain to be seen, therefore, that the Norris-LaGuardia Act has no application here because this is not a labor dispute case. (R. 301-302)

VI.

(a) There Was No Evidence in This Case Which Could Possibly Support a Specification Concerning Actual Knowledge by the Plaintiffs of the Hearing Before the Adjustment Board in Respect to Award 6640.

(b) Reply to the Brakemen's Jurisdictional-Dispute Argument. (Continuation from Part V of This Brief.)

(In Reply to pages 30-34 of Brakemen's Petition.)

The argument contained at pages 30 to 34 of the brakemen's petition is a mere restatement of what was pre-

sented in the District Court and before the Court of Appeals. At page 30 of their petition, the brakemen state it to be a fact "that the porters had actual knowledge" of the Adjustment Board proceedings. This is indeed a strange and unsupportable assertion if it is meant to suggest that they knew of the hearing. The attorneys representing all the parties in this case, pursuant to stipulation, spent a whole week in Texas, New Mexico, and Missouri taking the depositions of forty witnesses. (R. 173-174) The sum total of the evidence so obtained was properly described by the Court of Appeals as being "meager evidence that they became aware of the award subsequent to its entry." (R. 303) The purpose of taking the depositions of the train porters in Amarillo, Texas; Albuquerque, New Mexico; and Kansas City, Missouri, was to determine whether the train porters had any actual knowledge of the hearing as to which it is certain they had no notice.

The Railway Labor Act requires notice of the hearing, and certainly that requirement would not be satisfied by a substitute knowledge of something *subsequent* to the hearing. There is nothing in the record, and indeed the brakemen have at no time argued, that plaintiffs had any notice or knowledge of any kind concerning the *hearing*. The award was rendered April 20, 1942 (R. 299) and, as stated by the Court of Appeals, the only semblance of any evidence of knowledge on the part of any of the plaintiffs was in relation to some vague information concerning a petition for rehearing, which, of course, was necessarily long after the hearing which led to Award 6640. (R. 303)

In a pre-trial decision in the *Templeton* case, (October 5, 1946), 7 Federal Rules Decision 116, BRT raised the issue of actual knowledge, in a motion to require plaintiff in that case to state whether or not he and the messenger-baggagemen, whom he claimed to represent, had actual knowledge of the proceedings in the Adjustment Board.

In support thereof BRT cited the *Elgin, Joliet & Eastern R. Co.* v. *Burley* case, (1946), 327 U. S. 661, in the same manner as the brakemen have cited that case at page 31 of their petition here. But the District Court of Missouri pointed out that the portion of the opinion in the *Burley* case on which BRT was relying is pertinent only to the question of "agency", as considered in the Burley opinion. The District Court of Missouri went on to say that it is not the ruling in the *Burley* case that actual knowledge of the pendency of a proceeding before the Adjustment Board, without more, is sufficient to make binding an award of that Board. On the contrary, the District Court of Missouri said that the Burley decision adheres to the proposition that compliance with the provisions of the Act as to notice, hearing and participation or representation before the Board, is essential before an award of the Board would be binding on a party. The District Court of Missouri also said, in the *Templeton* case, 7 Federal Rules Decision 116, at page 118:

> "Conceding that actual knowledge of a proceeding before the National Railroad Adjustment Board alone may be sufficient to estop a person from attacking an award of such Board, which I sincerely doubt, yet if a person with actual knowledge was not permitted to be heard either in person or by counsel, then the award of such Board would be void if, in fact, it undertook to adjudicate and destroy rights personal to such a party. The effect of the ruling in the Burley case sustains plaintiff's contention with reference to the failure to give notice, as alleged in his petition * * *."

The reasoning contained in the opinion of the Seventh Circuit in the case before this Court, and the reasoning of the District Court of Missouri in the *Templeton* case, 7 Federal Rules Decisions 116, demonstrate, we believe, that there is no substance to this secondary position of

the brakemen. If a person is legally entitled to notice of a hearing, as in this case where the Railway Labor Act so provides, we believe that he can not lawfully be denied that right on the basis that some vague, inconclusive or random statements concerning the subject matter generally should be considered a sufficient substitute for the statutory notice to which he was entitled.

At pages 31 to 34 of their petition, the brakemen conjecture what the plaintiffs in this case might have done if a proper legal notice had been furnished them of the pendency of the proceedings then before the Adjustment Board and prior to the hearing which resulted in Award 6640. By this means the brakemen attempt to reconstruct their unsuccessful theory that a jurisdictional dispute is involved in the case before this Court. But all such argument by the brakemen can have no effect for two reasons. First, no jurisdictional dispute in fact is contained in this case—this having been shown clearly by the opinion of the Seventh Circuit (R. 304-305), and again by the opinion of the District Court of the Eighth Circuit, in the *Templeton* case. (Appendix, pp. 13-16) Second, when Congress gave parties involved in any dispute submitted to the Adjustment Board the right to be given due notice of a hearing, it did not circumscribe, limit or condition the right in regard to the use they might make of the notice or concerning the exercise of whatever remedies they might want to pursue upon the receipt of such notice. Over and above all this portion of the argument by the brakemen petitioners, and completely blotting out its show of significance, is the fact that both the Seventh Circuit and the United States District Court of the Eighth Circuit have held that the Adjustment Board exceeded its authority by rendering awards which did not amount to an interpretation of a collective agreement, but were in reality the writing of a new agreement between BRT and Santa Fe. (R. 306) (Appendix, pp. 14-16)

At page 32 of their petition, the brakemen mention and quote from *Order of Railroad Telegraphers, et al.* v. *New Orleans, Texas & Mexico Ry. Co., et al.*, 156 F. 2d 1 (8th Cir. 1946); certiorari denied, 329 U. S. 758. But in that case the action was a declaratory judgment suit brought by one union against another union. The Eighth Circuit declared:

> "The controversy concerns the proper interpretation and application of the collective bargaining contracts of the two unions to the positions and work performed by the Telegraphers' Craft on the one hand and the Clerks' Craft on the other."

In the case before this Court there are no conflicting collective bargaining agreements between the railroad and different labor organizations. There is only one collective bargaining contract involved—the one between Santa Fe and BRT. The plaintiffs in the instant case did not ask for an interpretation of any collective bargaining contract. In short, the *Order of Railroad Telegraphers* case involves a jurisdictional dispute between two railroad unions, each having a collective bargaining contract with the employing carrier and each contending that its contract, construed in the light of custom and usage, gave it jurisdiction over the work assigned to the other union. In that case, the Eighth Circuit held that it could not adjudicate jurisdictional disputes between the two collective bargaining organizations.

The Seventh Circuit made it clear that in the case before this Court, a jurisdictional ruling was not sought to be obtained as to the rights of the parties to the performance of head-end work on passenger trains, and that the order appealed from did not make or pretend to make such an adjudication. (R. 305) The opinion of the Seventh Circuit shows that the rights of the parties under the order invalidating the award have not been determined and have not been changed; they re-

main just as they were before the award was made. (R. 305)

Certainly, this does not present a situation in which the court has invaded the field committed to the special governmental agency designed by Congress to handle the settlement of disputes under the Railway Labor Act. Here, in fact, is the opposite. No labor dispute has been settled by the Seventh Circuit's decision. This case bears no resemblance to the Supreme Court's decisions on the subject of jurisdictional disputes. It is not like that of *General Committee* v. *M-K-T Railroad,* 320 U. S. 323 (1943), a controversy between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. It is not like the *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561 (1946), a controversy between the Brotherhood of Railroad Trainmen and the Order of Railway Conductors, which we have analyzed at pages 32-33, hereof. The decision of the Seventh Circuit does not direct the Adjustment Board how to decide the dispute. It merely exerts the power of equity to prevent the Board from defeating the Railway Labor Act, and it leaves the whole dispute as it was before the void award was rendered.

The essential difference in the authorities relied on by the brakemen is that in the case before this Court there are no conflicting or overlapping collective agreements; there is no dispute between collective bargaining agents; there is no question of representation of a class or craft; and it affirmatively appears that judicial intervention was necessary to protect the rights of the plaintiffs.

Nothing could more clearly show the distinction between a case which presents a justiciable controversy, such as the one before this Court, as compared with a case which does not present a justiciable controversy, than paragraph (9)

of the conclusions of law by the District Court of Missouri in the *Templeton* case, decided March 30, 1949. (Appendix, p. 15) After granting the relief prayed for by the plaintiff in that case on issues which parallel those in the case before this Court, the District Court of Missouri refused to act on Santa Fe's cross-claim asking for a declaratory judgment to give a construction to the provisions of a different collective bargaining agreement between Santa Fe and the Trainmen, than the agreement upon which the void Awards 6635 to 6639, inclusive, had been predicated.

That is, the District Court of Missouri held that those Adjustment Board awards were void because no notice had been given to parties involved in the dispute and because the awards were not premised on any existing agreement between Santa Fe and BRT. On this basis, the Court concluded that the Adjustment Board made a new agreement for BRT and Santa Fe and that it went beyond the authority and jurisdiction conferred on it by Section 3, First (i) of the Railway Labor Act. (Appendix, pp. 14-15)

However, as to Santa Fe's request for a declaratory judgment to go outside the issues presented by Awards 6635 to 6639, inclusive, which related to the Eastern and Western Lines' contract between BRT and Santa Fe, the Court concluded that it had no jurisdiction to entertain a dispute on a matter which had not been referred to the Adjustment Board, and accordingly Santa Fe's cross-claim in the *Templeton* case was dismissed. (Appendix, p. 15) Then, in like manner as the Seventh Circuit had done, the Court concluded that the parties were not restrained or enjoined from pursuing any remedies they may have under the Railway Labor Act. (Appendix, p. 16)

Thus, we see that the Templeton decision of the District Court of the Eighth Circuit fully harmonizes with the decision of the Seventh Circuit now before this Court, and

that there is no legal foundation for the lengthy argument on the subject of justiciable controversies which runs all through the petition submitted by the brakemen to this Court.

Everything that is stated by the brakemen petitioners at page 34 of their petition, in which they suggest what the plaintiffs in this case might have done, instead of appealing, as they did, to a court of equity to protect their rights against the enforcement of a void award, is more properly a statement of what BRT should have done, and should now do. If BRT desired to strike out of its schedule of rules with Santa Fe the clause in Article XXIX which provides that the rules do not extend to train porters, there was, and is, a legal way to go about it under the Railway Labor Act. In spite of the fact that the Train Service Board of Adjustment awards had gone against BRT (R. 246-248; 305), and notwithstanding whether Santa Fe or the plaintiffs might have been opposed to such a course, nothing in the law can prevent, or could have prevented, BRT from serving a notice upon Santa Fe under Section 6 of the Railway Labor Act, and submitting a proposal to require Santa Fe to give the brakemen the right to perform head-end work on passenger trains. If Santa Fe had been, or would be, unwilling to agree to this proposal, the provisions of the Railway Labor Act authorize BRT to invoke the services of the National Mediation Board; and, if they had failed, or should hereafter fail, to obtain their objective by that means, arbitration under the Railway Labor Act could have been, and can be, proposed; and, if that had been, or may be, rejected by Santa Fe, the statute would have permitted, and now permits, the President to create an emergency board to hold hearings and make findings and recommendations in regard to the dispute.

In the situation which this litigation now presents, as determined by the Court of Appeals of the Seventh Circuit

and as determined by the District Court of the Eighth Circuit in the *Templeton* case, the course indicated still remains open to BRT. Santa Fe submits that the meaning of the decision now before this Court (R. 299-307), and the meaning of the *Templeton* case (Appendix 1-16), is that the courts will not sanction an unlawful by-passing of the legitimate methods of collective bargaining prescribed by the Railway Labor Act.

VII.

The Court of Appeals of the Seventh Circuit Did Not Review an Interpretation of the Adjustment Board in Award 6640. It Decided, First, That the Award Was Void for Lack of Notice to Parties Involved in the Dispute and, Secondly, That the Board Did Not Interpret an Existing Agreement But Made and Declared a New Agreement for the Parties.

(In Reply to pages 35-36 of Brakemen's Petition.)

The exposition of the Court of Appeals of the Seventh Circuit is so straightforward and simple (R. 306) that it is difficult to make it any plainer. It says that the agreement between BRT and Santa Fe, contained in Article XXIX of the December 1, 1926 schedule between those parties, "leaves no room for doubt that such agreement was not to extend to the work then being performed by the porters." Even the brakemen petitioners do not deny that this is a fact. But they say that the court did not have the whole contract before it and that the memorandum agreement of April 27, 1944 stands in the way of such a conclusion.

As to the first point, Santa Fe repeats that since February 8, 1927, BRT knew that Article XXIX of its collective agreement meant just what the Seventh Circuit has said it means. The Train Service Board of Adjustment for the Western Region said no less in its Decision 2336, on

February 8, 1927. That decision was shortly after the December 1, 1926 agreement had been negotiated between BRT and Santa Fe. The same December 1, 1926 agreement is still in effect between Santa Fe and BRT. Since 1927, therefore, BRT has known that Article XXIX of its collective agreement did not give the brakemen the right to do the work which plaintiffs were performing at the head-end of passenger trains on the Santa Fe. (R. 247-248)

If there were any evidence in existence to dispute the fact that the BRT agreement "was not to extend to the work then being performed by the porters" (R. 306), such evidence would have been produced by BRT in the United States District Court.

In the light of these facts, as shown in the opinion of the Court of Appeals, particularly its summing up (R. 306), it cannot be doubted that the Adjustment Board exceeded its authority. The Seventh Circuit did not review the Adjustment Board's interpretation of the contract. On the contrary, it found that the Adjustment Board had nothing to interpret; that it did not even pretend to interpret the contract; and that, by means of usurping a power not conferred on it by statute, it presumed to rewrite the contract for BRT and Santa Fe.

The District Court of Missouri reached the same opinion in the *Templeton* case and the rationale of the latter decision confirms what we have stated.

What is said at page 36 of the brakemen's petition, merely repeats what was in their motion to vacate and dissolve the temporary restraining order entered October 31, 1944 (R. 117-124), which was completely answered by the December 12, 1947 memorandum decision of United States District Judge LaBuy, who said:

"The award could not become final and enforcible

until after the petition for rehearing had been heard or withdrawn; prior to that time the rights of the parties must necessarily be in abeyance. The award was therefore an enforcible award at the time the complaint was filed." (R. 131)

VIII.

The Findings of Fact and Conclusions of Law Were Adequate to Support the Judgment.

(In Reply to Pages 36-38 of Brakemen's Petition.)

Findings of fact and conclusions of law were entered by the court below in support of its temporary restraining order of January 16, 1948. (R. 135-143) On February 6, 1948, it again made findings of fact and conclusions of law and an order for temporary injunction. (R. 201-208) An examination of the lengthy findings and conclusions, is sufficient, we believe, to establish that the decision before this Court is amply supported.

The issue for decision was whether plaintiffs had been deprived of a notice to which they were entitled under the law, and whether they were otherwise wrongfully deprived of their rights. The whole argument at pages 36 to 38 of the brakemen's petition, as can almost fairly be said of the entire petition before this Court, is built around the April 27, 1944 memorandum agreement between BRT and Santa Fe, which states that it was made for the purpose of implementing and complying with the award. (R. 155, 164) The brakemen presented this same argument to the Court of Appeals in their petition for rehearing (R. 309-318), and they called on the Court of Appeals to "state definitely what its holding is with respect to the agreement of April 27, 1944". (R. 313) In their petition for rehearing the brakemen quoted from the oral argument before the Court of Appeals (R. 312-313) and they insisted

that Santa Fe had committed itself to the proposition that the April 27, 1944 agreement and Award 6640 were "all wrapped up together". They quoted from Santa Fe's oral argument that the agreement "would not have been entered into except for the award. It was entered into in compliance with the award." (R. 313)

The substance of the argument made by the brakemen in their petition for rehearing before the Seventh Circuit was that unless the court granted a rehearing and thereafter expressly said something, in a rehearing opinion, about the April 27, 1944 agreement, the necessary implication would be that the memorandum agreement must be taken to have fallen with the award which the Seventh Circuit declared void. Santa Fe did not dodge this issue in its answer to the petition for rehearing in the Court of Appeals but met it squarely and completely. (R. 329-331) We submit that, under these facts and circumstance, what has been described by the brakemen at pages 36 and 37 of their petition as the "complete silence" of the Court of Appeals, is exactly the opposite, and that by every reasonable implication the Court of Appeals has given the brakemen to understand what its decision means, with no less certainty than did the District Court of Missouri in the *Templeton* case, which expressly declared:

> "The letter agreements entered into by the Santa Fe and Trainmen, giving legal effect and enforcement to said awards, are illegal and void and their application to plaintiff and members of the class here represented, in destruction of their right to employment, at will, by the Santa Fe are restrained and enjoined." (Appendix, p. 16)

IX.

The Amount of the Injunction Bond Was Within the Discretion of the Trial Court.

(In Reply to Pages 39-40 of Brakemen's Petition.)

On the question of inadequacy of the injunction bond, Santa Fe says that the same point was present before this court in the case of *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. (2d) 4 (1947, C. C. A. 8). There were two petitions for certiorari (Dockets 661 and 711). The M-K-T Railroad's petition (Docket 711) urged that the $500 bond was wholly insufficient to cover the potential liability. The Railroad contended that it was error for the District Court to overrule its motion to increase the amount of the bond from $500 to $200,000. In the M-K-T Railroad's petition for certiorari it pointed out that the Eighth Circuit did not pass on the inadequacy of the bond; with the net result that the Railroad petitioners had only a $500 bond to protect them against a potential liability of more than $300,000, as of March 31, 1948; and increasing at the rate of more than $500 per day.

From this we see that the same point was presented by the Missouri-Kansas-Texas Railroad Company in its petition for certiorari, which this Court denied.

Conclusion.

The powerful and well reasoned opinion of the United States Court of Appeals for the Seventh Circuit (R. 299-307) is clearly right. The effect of the decision is to leave the parties just as they were before the void award was rendered, so that they can avail themselves of the lawful avenues of conduct provided for them in the Railway Labor Act. (R. 302) A denial of certiorari will, therefore,

bring about a compliance with the legitimate methods of collective bargaining.

The record in this case discloses that the First Division of the National Railroad Adjustment Board by-passed and defied the command of the Railway Labor Act. The Seventh Circuit condemned and denounced the conduct of the Adjustment Board. (R. 306)

At page 326 of the record, Santa Fe commented on a series of cases in which the Court of Appeals for the Seventh Circuit has preserved the Railway Labor Act from mutilation. Among them was the case of *Delaware & Hudson R. Corporation* v. *Williams,* 129 F. 2d 11 (7th Cir. 1942). We can think of no better way to conclude our brief than to quote what the carrier members of the First Division, National Railroad Adjustment Board, said in the brief which they filed in this Court (October Term, 1942, Docket 446-447):

> "If any party to a proceeding before the Board should be tempted again to pursue the plan followed here, it is clear, we believe, that the decision below is the only one which can preserve the integrity and effectiveness of the Adjustment Board."

For the reasons set out in this answer, Santa Fe respectfully prays that the writ be denied.

Respectfully submitted,

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W. J. Milroy,
80 East Jackson Boulevard,
Room 1211, Chicago 4, Illinois.
Counsel for The Atchison, Topeka and Santa Fe Railway Company, Defendant-Respondent.

May 9, 1949.

APPENDIX.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI,

WESTERN DIVISION.

HAROLD H. TEMPLETON, *Plaintiff,* vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, PANHANDLE AND SANTA FE RAILWAY COMPANY, a corporation, and BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary, unincorporated association, *Defendants.*	No. 4234.

FINDINGS OF FACT.

Plaintiff is a citizen, resident and inhabitant of the State of Missouri. The individual members of the class that plaintiff here represents are citizens and inhabitants of various other States. The class which plaintiff here represents consists of approximately Two Hundred and Seventy-five (275) members, employees of the defendants Atchison, Topeka and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company, having a common interest in the relief here sought and whose several rights and property will be directly affected hereby. Defendant Atchison, Topeka and Santa Fe Railway Company is a corporation, incorporated under the laws of the State of Kansas. Defendant Panhandle and Santa Fe Railway Company is a

corporation, incorporated under the laws of the State of Texas. Defendant Brotherhood of Railroad Trainmen is a voluntary, unincorporated association and labor union, having its residence and principal place of business at Cleveland, Ohio. The matter here in controversy between the parties exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

For many years, beginning sometime prior to 1892 and to September 15, 1945, the defendant Atchison, Topeka and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company (both said defendants will hereafter be referred to as "Santa Fe" regardless of their corporate entity and the particular portion of the Santa Fe system they served), have uniformly by custom and practice, employed in "joint service" on the Eastern and Western Lines of the Santa Fe, express messengers also in the employ of the Railway Express Agency, Incorporated, or one of its predecessors (hereafter termed "Express Company"), for the handling of United States mail, baggage, Santa Fe mail, company material, and other items transported and carried by the Santa Fe in baggage cars on certain of its passenger trains. It now employs such express messengers in "joint service" on that portion of its railroad known as the Coast Lines. (The Eastern and Western Lines of the Santa Fe, informally stated, extend from Chicago, Illinois, to Albuquerque, New Mexico. The Coast Lines extend from Albuquerque, New Mexico, to Los Angeles, California, and along the Pacific Coast.)

The custom and practice of employing express messengers in such "joint service" arose perforce of certain written contracts entered into between the Santa Fe and the Express Company. Under said contracts it was agreed that the Express Company could arrange with the Santa Fe for station and train employees of the Santa Fe to act as agents and express messengers of the Express Company to handle

express at railroad stations, subject to rules of the Express Company; and, that the Santa Fe could arrange with the Express Company for the agents and express messengers and other employees of the Express Company to act as station or train employees of the Santa Fe, subject to the rules of the Santa Fe and upon such terms as may be agreed upon by the two companies. Said contract specifically provided that all agents and employees of the Express Company while on the premises or on lines of the Santa Fe should conform to the general rules of the Santa Fe then in force, and in case any messenger or other employee of the Express Company should from any cause be objectionable to the Santa Fe he would be removed or discharged upon the written request of the Santa Fe.

Under such arrangement, the Express Company has during all the times here in question hired express messengers who have been so engaged in "joint service" on the Santa Fe. The term "joint service" or "joint serviceman" as hereafter used, means a type of employment whereby one individual serves as an express messenger and handles express for the Express Company, and also serves as a "train baggageman" and handles baggage, United States mail, railroad mail, and other items of railroad property. All the work so performed by such an individual is done in a baggage car operated by the railroad as part of the consist of passenger trains.

"Joint service" exists on practically all railroads operating west of the Mississippi River and east of the Pacific Coast.

At the present time and in recent years, the Brotherhood of Railway & Steamship Clerks, Etc. Union is, and has been, the collective bargaining agent for express messengers. The only existing collective bargaining agreement governing rates of pay, hours and working conditions for express messengers, whether in "joint service" or other-

wise, is between the Clerks' Union and the Express Company. (No such agreement exists on behalf of any such employees with the Santa Fe. The Santa Fe could, of its own volition, terminate "joint service" on its lines at will.) Under the provisions of the collective bargaining agreement which the Clerks' Union has with the Express Company, the latter is given the right to establish seniority districts for all express messengers in its employ. Express messengers employed by the Express Company work in depots, on trains as express messengers only, and some of them work in "joint service". Separate rosters or seniority lists are maintained by the Express Company for each such job classification. When an express messenger is hired by the Express Company and awarded a regular job, his depot seniority begins; when such a messenger enters train service or "joint service" he acquires what is termed "road seniority". Both such seniorities continue to accrue to an express messenger in the employ of the Express Company after he enters train or "joint service" and such employee can bid back and forth for positions in each such job classification on the several railroads employing "joint service". The bargaining agreement the Clerks' Union has with the Express Company provides for the bulletining of vacancies occurring in "joint service". When such a vacancy occurs on the Santa Fe, the Express Company bulletins such vacancy and express messengers are invited to bid therefor. Ten (10) days after the date of filing bids, the Express Company posts a notice on the bulletin board, showing who is the successful bidder. The Santa Fe is thereupon notified of the person who is the successful bidder for a given train run, on which "joint service" is employed, and the successful bidder for such job then reports to the Santa Fe Baggage Car on that particular run, and thereupon enters "joint service" on the Santa Fe. The Santa Fe at all times had knowledge of the bargaining agreement between the

Express Agency and the Clerks' Union, and that jobs in "joint service" on its trains were filled by right of seniority arising perforce of such bargaining agreements. Express messengers in "joint service" are known and referred to by the Express Company and the Santa Fe as "messenger-baggagemen". "Messenger-baggagemen", when handling express while in "joint service", are subject to the direction, instruction and control of the Express Company. When they handle baggage, United States mail, etc., the Santa Fe retains the right tc direct and instruct, and did direct and instruct, "messenger-baggagemen" in all phases of such baggage work. The Santa Fe issued printed instructions to "train baggagemen" governing the handling of baggage and mail carried by it. Such instructions were received and followed by "messenger-baggagemen" in "joint service"; and, various daily reports required to be made by train baggagemen were made by "messenger-baggagemen" and submitted to the Santa Fe's General Baggage Agent. All "messenger-baggagemen" employed in "joint service" were paid for all work performed by them directly by the Express Company. The Santa Fe reimbursed the Express Company to at least fifty percent (50%) of the compensation so paid "messenger-baggagemen". The Santa Fe also pays to the Express Company one-half of the Railroad Retirement Tax paid by the Express Company for express messengers into the Railroad Retirement Fund established by the Railroad Retirement Act of 1937 (*Title 45, U. S. C. A., 214, etc.*). "Joint-servicemen" are and were subject to the provisions of the Railroad Retirement Act of 1937. In addition thereto, the Santa Fe grants passes to "messenger-baggagemen" on the same basis that passes are and were granted by it to all Santa Fe employees, and "messenger-baggagemen" receive from the Santa Fe, by reason of their "joint service", other incidental advantages.

In the year 1892, the Santa Fe and defendant Brotherhood of Railroad Trainmen (hereinafter referred to as "Trainmen") first entered into a contract prescribing rules, rates of pay and working conditions for brakemen and baggagemen employed by the Santa Fe. There has at all times since been in effect such a contract between said parties. The Brotherhood of Railway Trainmen is, pursuant to Section 2, Third, of the Railway Labor Act of 1926 (Title 45, U. S. C. A., 152, Third) the collective bargaining agent for all employees of the Santa Fe denominated as brakemen and baggagemen. Sections 29 and 23 of the bargaining agreement between the Santa Fe and Trainmen, provide:

> "ARTICLE XXIX. The term 'Trainman' or 'Trainmen,' as used in this agreement, is understood to mean freight and passenger Brakemen, and Baggagemen, with the further understanding that this definition does not change, alter or extend present application of these rules to baggagemen or train porters."
>
> "ARTICLE XXIII.
>
> (a) All vancancies occurring in baggage runs not controlled by joint service shall be filled from the ranks of eligible and competent brakemen; oldest brakemen to have preference in all extra or special runs or excursion trains.
>
> (b) When a brakeman is required to take charge of or handle baggage, regular or extra brakeman shall perform the service; oldest man to have the preference."

Some time prior to the year 1935, a grievance arose between the Santa Fe and twelve (12) baggagemen, eight (8) of whom were members of the class of train service employees represented by the Trainmen. As a consequence thereof, a protest petition was filed by the Trainmen against the Santa Fe, before the First Division of the National Railroad Adjustment Board, pursuant to Section 3, of the Railway Labor Act of 1926 (Title 45, U. S. C. A.,

153). Tersely stated, the dispute there involved arose out of the protest of twelve (12) baggagemen whose employment in baggage service on Santa Fe Trains Nos. 3 and 4, running between Chicago and Albuquerque had been discontinued on June 20, 1931, and whom the Santa Fe had replaced in such service with Barbers employed on said trains. Subsequent thereto, in the years 1939 and 1940, five (5) other protests were filed by the Trainmen against the Santa Fe, before the National Railroad Adjustment Board, First Division, involving the right to perform baggage work on certain other trains of the Santa Fe operating in the Eastern and Western Divisions. The substance of such protests was that the Trainmen claimed that "the handling of baggage on any and all the carrier's trains in service * * * properly belongs to trainmen holding seniority as brakemen" under the bargaining agreement the Trainmen had and now have with the Santa Fe; that express messengers, employees of the Santa Fe who did not have, or acquire, seniority as brakemen under such bargaining agreement should not be used as "train baggagemen"; and, that certain brakemen, holding seniority rights, who were not given train baggage work, should "be reimbursed for any monetary loss occasioned by reason of their displacement by express messengers." In said proceedings, the Trainmen specifically alleged in their said protest claims, and contended before the First Division, National Railroad Adjustment Board, that express messengers then engaged in baggage work by the carrier were "employees of the A. T. & S. F. Railway Company" and that for such baggage work express messengers were paid "exclusively out of the funds of the carrier (and) therefore, they are not joint employees" of the Santa Fe and Express Agency, so far as baggage work was there involved in such protest proceedings. Plaintiff and no member of the class he represents in this instant

action, nor the Brotherhood of Railway & Steamship Clerks Etc. Union, were given any notice by the Santa Fe, the Brotherhood of Railroad Trainmen, or the National Railroad Adjustment Board, of the pendency of such protest proceeding before the National Railroad Adjustment Board, First Division, and plaintiff and no member of the class he represents, or the Brotherhood of Railway & Steamship Clerks, Etc. Union, were made parties to, or appeared in person or otherwise, in any such proceedings. April 20, 1942, the employee representatives and referee, constituting a majority of the First Division, National Railroad Adjustment Board, entered and promulgated in said proceedings, Awards numbered 6635, Docket No. 7684; 6636, Docket No. 10405; 6637, Docket No. 7685; 6638, Docket No. 7686; and 6639, Docket No. 7687; referred to in the evidence. Plaintiff and all the members of his class did not learn of said proceedings and the effect of such awards until shortly before their services were terminated and they were displaced by brakemen, on September 15, 1945.

At the time of the promulgation of such awards, "joint-servicemen" on that part of the Santa Fe Railway known as the Coast Lines, handled practically all baggage, United States mail, Santa Fe company mail, and other items carried and handled by the Santa Fe on its passenger trains operated on the Coast Lines, and such work in part was handled by "joint-servicemen" on that part of the Santa Fe Railway known as the Eastern and Western Lines. In the majority of instances, baggage and express carried on passenger trains then operated by the Santa Fe, was handled by "joint-servicemen" in the employ and under the supervision, direction and control of the Santa Fe.

After publication of the aforesaid awards, the Santa Fe filed petitions before the Railroad Adjustment Board, First Division, for a rehearing on said claims and protests. A majority of said Board failed and neglected to pass or rule

on said motions for a rehearing for more than eighteen months. While said petitions for rehearing were so pending, and as a result of the impact of said awards, the penalties therein assessed against the Santa Fe, and upon demand of the Brotherhood of Railroad Trainmen, certain negotiations were carried on between representatives of the Trainmen and the Santa Fe for the purpose of settling the matters then in dispute between said parties and making effective the provisions of said awards. The awards of the Railroad Adjustment Board, First Division, above referred to, had not at that time been made effective or been applied by the Santa Fe. One S. C. Kirkpatrick, as a representative of the Santa Fe, and one Frank W. Coyle, as a representative of the Trainmen, were selected by the respective parties to carry on such negotiations. On or about April 27, 1944, said individuals entered into an accord on behalf of the Santa Fe and the Trainmen, whereby the awards made by the National Railroad Adjustment Board, First Division, in the aforesaid proceedings, Nos. 6636, 6637, 6638, and 6639, were made effective and the penalties provided for therein were adjusted and paid by the Santa Fe to the brakemen involved in said proceedings. (B. of R. T. Exhibit 5.) Neither the representative of the Santa Fe nor that of the Brotherhood intended by the negotiations then conducted, or the accord or agreement then entered into, to alter, change or modify the terms of the bargaining agreement then existing between the Santa Fe and the Brotherhood of Railroad Trainmen in any respect. The purpose of said negotiations and the agreement effected by the parties thereto was to put the principles of the awards, *supra*, of the National Railroad Adjustment Board, First Division, into effect and to make a practical application of said awards to the baggage operations of the Santa Fe then conducted on its Eastern and Western Lines. As a consequence of said

accord, the Santa Fe withdrew the petitions for rehearing previously filed before the First Division of the National Railroad Adjustment Board, because the subject-matter of said awards was disposed of by mutual agreement between the Santa Fe and the Trainmen, and said awards became final and binding on the Santa Fe.

As a result of the awards, *supra*, of the First Division of the National Railroad Adjustment Board and the accord then reached between the parties, implementing said awards and defining the manner in which they should be made effective, the Santa Fe terminated the service of all messenger-baggagemen then employed by it as "train baggagemen" upon its Eastern and Western Lines, as of September 15, 1945, and thereafter engaged brakemen-baggagemen, members of the Brotherhood of Railroad Trainmen, to handle all such baggage on its passenger trains operated on its Eastern and Western Lines. Since September 15, 1945, the Santa Fe has only employed brakemen for the purpose of handling baggage on said trains. At the time messenger-baggagemen were employed in "joint-service" by the Santa Fe to handle baggage, and since September 15, 1945, that brakemen-baggagemen have handled baggage on its trains, they have been commonly referred to and known as "train baggagemen." A "train baggageman" is an employee of the Santa Fe, and is a person handling and making necessary records of baggage, or baggage and mail, in the baggage car on a train. A train baggageman is not charged with any duties concerning the operation of the train.

As a result of the discontinuance and termination of the employment of "messenger-baggagemen" in "joint service", for the handling of baggage on the Eastern and Western Lines of the Santa Fe, fifty-four (54) messenger-baggagemen, employees of the Santa Fe and members of the class whom plaintiff represents lost their jobs, not

only with the Santa Fe, but with the Express Agency, also. Two hundred fifty (250) messenger-baggagemen were discontinued in "joint service" on the Santa Fe as a result of said awards, and the implementation thereof by the accord between the parties, as above stated. Such action resulted in a general reduction of the hours of employment and wages of all such messenger-baggagemen in joint service on the Santa Fe and the loss of other advantages previously enjoyed by said joint-servicemen by reason of their employment with the Santa Fe.

The termination of the use of joint-servicemen in the employ of the Santa Fe for the handling of baggage on the Eastern and Western Lines of the Santa Fe, directly resulted from the awards of the National Railroad Adjustment Board, First Division, Nos. 6635, 6636, 6637, 6638 and 6639, above referred to, and the letter agreements entered into between the Santa Fe and the Brotherhood of Railroad Trainmen for the purpose of implementing said awards and putting them into effect; that had it not been for the promulgation of said awards by the National Railroad Adjustment Board, First Division, and the accord reached between the Santa Fe and the Brotherhood of Railroad Trainmen at the insistence and demand of the Trainmen implementing said awards and putting the same into effect, the Santa Fe would not have discontinued the employment of messenger-baggagemen in joint service and in its employ for the handling of baggage on passenger trains operated by it on its Eastern and Western Lines on September 15, 1945. The discontinuance and termination of the employment of joint-servicemen in the employ of the Santa Fe was induced, procured and brought about by the Trainmen by the filing before the Railroad Adjustment Board of the claims and protests above referred to, which resulted in the promulgation of the awards and accord implementing the same, and the insistence and demand of

the Brotherhood of Railroad Trainmen made against the Santa Fe, that said awards be put into effect and complied with. The Santa Fe did not will to terminate the employment by it of "messenger-baggagemen" on its Eastern and Western Lines, independent of the awards of the National Railroad Adjustment Board, First Division, and the insistence and demand of the Brotherhood that said awards be complied with, and put into effect. The Santa Fe does not now will to discontinue or terminate "messenger-baggagemen" now in its employ upon the Coast Lines of its system, but because of the penalties assessed against it perforce of the awards, *supra*, and the demands the Brotherhood of Railroad Trainmen is now asserting against the Santa Fe, it is threatening to and will discontinue such "joint service" on its Coast Lines.

The Brotherhood of Railroad Trainmen now assert the right to perform and handle all baggage on any and all Santa Fe trains now in service by virtue of the awards of the National Railroad Adjustment Board, First Division, and the letter agreements entered into between the Santa Fe and the Trainmen, implementing said awards and making the same effective, and will continue to so assert, insist and demand, and thereby compel, induce and procure the further and continued discharge and displacement of messenger-baggagemen, employees of the Santa Fe. The enforcement of said awards and letter agreements implementing the same and making them effective deprive plaintiff and the members of his class, employees of the Santa Fe, of the right to continue to perform baggage work for the Santa Fe, at the will of the Santa Fe, uninfluenced and without illegal interference or compulsion of the Trainmen, and the impact of the awards of the National Railroad Adjustment Board, *supra*.

Conclusions of Law.

(1) The cause of action here asserted by plaintiff, arising under the Constitution and laws of the United States between citizens of different States and more than $3,000.00 involved, the Court has jurisdiction of the parties and subject-matter thereof.

(2) The complaint herein states a claim upon which relief can be granted to plaintiff and the members of the class plaintiff here properly and legally represents, and the motion of defendant Brotherhood of Railroad Trainmen joined in its answer should be, and the same is hereby, overruled.

(3) Plaintiff and the members of the class he here represents are and were while in "joint service" handling baggage, United States mail, company mail and other property of Santa Fe, carried in its baggage cars, employees of the Santa Fe, at will. As such employees, they are and were "Trainmen" within the purview of Section 3(h) (*Title 45, U. S. C. A., Section 153(h)*) Railway Labor Act, and entitled to due notice and to be heard in the dispute involved in Awards 6635, Docket No. 7684; 6636, Docket No. 10405; 6637, Docket No. 7685; 6638, Docket No. 7686; 6639, Docket No. 7687; before the National Railroad Adjustment Board, First Division, in that their employment as "train baggagemen" with the Santa Fe, was directly determined and affected in said proceedings.

(4) That the aforesaid awards of the National Railroad Adjustment Board, First Division, are illegal and void, in that they were rendered by said Board, in violation of Section 3(j) (*Title 45, U. S. C. A., 153(j)*) of the Railway Labor Act, because plaintiff and the members of the class whom he represents involved in said proceedings, were given no notice thereof, or afforded an opportunity to be heard therein, either in person or by counsel.

(5) Compliance by the Santa Fe with the provisions of said awards deprives plaintiff and the class he represents, of property rights without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(6) As employees at will of the Santa Fe, plaintiff and the members of the class he here represents were entitled to such employment at the will of the Santa Fe, without illegal interference, compulsion and unjustified interference by the Trainmen. That the insistence and demands of the Trainmen that the substance of the illegal and void awards of the National Railroad Adjustment Board be applied and made effective by the Santa Fe, under the circumstances here revealed, and the implementation and application of said awards effected by the letter agreements entered into between the Santa Fe and Trainmen, is and was unjustified, unwarranted and illegal interference with the employment at will by the Santa Fe, of plaintiff and the members of the class he here represents, and should be restrained and enjoined by this Court.

(7) That the letter agreements entered into between the Santa Fe and the Trainmen, not intended by the parties thereto to effect a modification, change or supplement to the bargaining agreement existing between said parties, this Court has jurisdiction to construe and determine the legal effect thereof, and upon a finding that said agreements are an application and implementation of illegal and void awards rendered by the National Railroad Adjustment Board, may restrain and enjoin the enforcement or further carrying into effect of said agreements.

(8) The awards of the National Railroad Adjustment Board, First Division, Numbers 6636 to 6639, inclusive, *supra*, adjudicating, as they do, that Trainmen are entitled to handle baggage on any and all trains of the Santa Fe and that such work belongs to trainmen holding seniority

as brakemen, to the exclusion of employees of the Santa Fe in "joint service", are void because that portion of said awards is and was beyond the authority and jurisdiction of the First Division, as defined in Section 3, First (i) of the Railway Labor Act. Such provision of said awards is not premised on any existing agreement between the Santa Fe and Trainmen, and in legal effect is the making of a new and different agreement and contract between the Santa Fe and the Traimen.

(9) The cross-claim filed by the Santa Fe, in this action, submits no justiciable issues of fact, and states no claim upon which relief can here be granted as therein prayed. Defendant Santa Fe, in this action neither admits nor denies any legal obligation to exclusively employ plaintiff or the members of his class, or brakemen acquiring seniority under its contract with the Trainmen to exclusively handle baggage carried on its passenger trains. By its cross-claim no affirmative relief is sought, unless this Court should determine that plaintiff and the members of his class, or brakemen, have the exclusive right to employment as "train baggagemen" on said trains. Said defendant by its cross-claim only seeks of this Court an advisory opinion by way of declaratory judgment as to the proper legal construction to be given to the provisions of its bargaining agreement with the Trainmen. This Court has no jurisdiction to construe said agreement and should not give legal advice or render an advisory opinion thereon when no justiciable controversy is shown to exist. Defendant Santa Fe's cross-claim herein should be, and the same is hereby, dismissed.

(10) Plaintiff and the members of the class he here represents, have no adequate remedy at law. Defendants are restrained and enjoined

(1) From giving legal effect and enforcement to Awards 6635, 6636, 6637, 6638 and 6639, *supra*, of the National Railroad Adjustment Board;

(2) The letter agreements entered into by the Santa Fe and Trainmen giving legal effect and enforcement to said awards are illegal and void, and their application to plaintiff and members of the class here represented, in destruction of their right to employment, at will, by the Santa Fe, are restrained and enjoined;

(3) The effect of the injunction here issued is to place the parties hereto in the same position they occupied on September 15, 1945, and as though no awards of the National Railroad Adjustment Board had been rendered and no agreements entered into between Santa Fe and Trainmen, implementing said awards and enforcing the same.

The parties are not restrained and enjoined from pursuing any remedies they may have under the Railway Labor Act.

Counsel prepare decree.

ALBERT A. RIDGE,
Judge.

Dated at Kansas City, Missouri, this 30th day of March, 1949.